DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 13-6440 *** CAPITAL CASE ***
Title: Anthony Ray Hinton, Petitioner
v.
Alabama
Docketed: September 19, 2013
Linked with 13A40
Lower Ct: Court of Criminal Appeals of Alabama
Case Nos.: (CR-04-0940)
Decision Date: February 15, 2013
Discretionary Court
Decision Date: April 19, 2013

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Jul 3 2013	Application (13A40) to extend the time to file a petition for a writ of certiorari from July 18, 2013 to September 16, 2013, submitted to Justice Thomas.
Jul 15 2013	Application (13A40) granted by Justice Thomas extending the time to file until September 16, 2013.
Sep 16 2013	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due October 21, 2013)
Oct 15 2013	Order extending time to file response to petition to and including November 20, 2013.
Oct 21 2013	Brief amicus curiae of The Constitution Project filed.
Nov 13 2013	Brief of respondent Alabama in opposition filed.
Nov 22 2013	Reply of petitioner Anthony Ray Hinton filed.
Nov 27 2013	DISTRIBUTED for Conference of December 13, 2013.
Dec 4 2013	Record Requested.
Jan 8 2014	Record received. Court of Criminal Appeals of Alabama (1 envelope)
Jan 9 2014	DISTRIBUTED for Conference of January 24, 2014.
Feb 10 2014	DISTRIBUTED for Conference of February 21, 2014.
Feb 24 2014	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED. Judgment VACATED and case REMANDED. Opinion per curiam. (Detached Opinion)
Mar 28 2014	MANDATE ISSUED.

PETITION FOR WRIT OF CERTIORARI

No. 13-6440

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY RAY HINTON, Petitioner,

v.

STATE OF ALABAMA, Respondent.

Supreme Court, U.S.
FILED
SEP 16 2013
OFFICE OF THE CLERK

ON PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

BRYAN A. STEVENSON
Counsel of Record
CHARLOTTE R. MORRISON
AARYN M. URELL
Equal Justice Initiative
122 Commerce Street
Montgomery, AL 36104
bstevenson@eji.org
(334) 269-1803

Counsel for Petitioner

September 16, 2013

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY RAY HINTON, Petitioner,

v.

STATE OF ALABAMA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE ALABAMA COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

BRYAN A. STEVENSON
Counsel of Record
CHARLOTTE R. MORRISON
AARYN M. URELL
Equal Justice Initiative
122 Commerce Street
Montgomery, AL 36104
bstevenson@eji.org
(334) 269-1803

Counsel for Petitioner

September 16, 2013

CAPITAL CASE

QUESTIONS PRESENTED

1. In this death penalty case, the State's evidence of guilt rested entirely on a single piece of scientific evidence presented by state forensic experts. In such a case, is the Sixth Amendment guarantee of effective assistance of counsel violated when appointed defense counsel fails to obtain a skilled, competent forensic expert without which no reliable conviction or adversarial testing of the State's charges against an accused could be accomplished?

2. When a state's criminal case against an indigent accused turns entirely on scientific evidence, should this Court provide guidance to lower courts on what the Sixth Amendment right to counsel requires of an appointed lawyer where the defendant cannot be effectively defended or reliably convicted without the aid of a skilled forensic defense expert and post-conviction evidence from skilled experts establishes a reasonable probability that the outcome of the trial would have been different had such evidence been presented?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

RELEVANT CONSTITUTIONAL PROVISIONS 2

STATEMENT OF THE CASE 3

A. Facts 6

B. Procedural History and the State Court Ruling on Review 15

REASONS FOR GRANTING THE WRIT

I. WITH INCREASING FREQUENCY, CRIMINAL PROSECUTIONS IN THIS COUNTRY ARE DEPENDENT ON SCIENTIFIC EVIDENCE WHICH OFTEN PROVIDES THE SOLE BASIS FOR A CRIMINAL CONVICTION. THIS COURT SHOULD REVIEW WHAT THE SIXTH AMENDMENT REQUIRES FROM DEFENSE COUNSEL TO PROVIDE CONSTITUTIONALLY EFFECTIVE ASSISTANCE IN SUCH A CASE AND WHETHER THE FAILURE TO OBTAIN A SKILLED, COMPETENT SCIENTIFIC EXPERT VIOLATES THE SIXTH AMENDMENT. 16

A. Trial Counsel's Performance with Respect to the Only "Reasonable and Available Defense Strategy" Was Unreasonably Deficient. .....

B. Counsel's Deficient Performance Was Prejudicial. 25

C. The Alabama Court of Criminal Appeals's Analysis Conflicts with the Requirements of the Sixth Amendment and Strickland v. Washington. 29

CONCLUSION 33

APPENDIX A Alabama Court of Criminal Appeals, Opinion affirming denial of postconviction relief and denial of rehearing, Hinton v. State, No. CR-04-0940, 2006 WL 1125605 (Ala. Crim. App. Apr. 28, 2006, reh'g denied June 23, 2006).

APPENDIX B Alabama Supreme Court, Order remanding for additional findings, Ex parte Hinton, No. 1051390, 2008 WL 4603723 (Ala. Oct. 17, 2008).

APPENDIX C Alabama Court of Criminal Appeals, Order remanding to circuit court, Hinton v. State, No. CR-04-0940, 2008 WL 5517591 (Ala. Crim. App. Dec. 19, 2008), Order on return to remand, August 26, 2011, and rehearing denial, October 21, 2011.

APPENDIX D Alabama Supreme Court, Order remanding for further compliance with remand order, Ex parte Hinton, No. 1110129, 2012 WL 5458542 (Ala. Nov. 9, 2012).

APPENDIX E Alabama Court of Criminal Appeals, Order complying with second remand, Hinton v. State, No. CR-04-0940, 2013 WL 598122 (Ala. Crim. App. Feb. 15, 2013, reh'g denied, Apr. 26, 2013).

APPENDIX F Alabama Supreme Court, Order denying a petition for a writ of certiorari, Ex parte Hinton, No. 1110129 (Ala. Apr. 19, 2013).

TABLE OF CITED AUTHORITIES

CASES

Adams v United States ex rel. McCann, 317 U.S. 269 (1942) 17

Ake v. Oklahoma, 470 U.S. 68 (1985) 10, 23, 30, 31

Charles v. State, 350 So. 2d 730 (Ala. Crim. App. 1977) 29

Ford v. Gaither, 953 F.2d 1296 (11th Cir. 1992) 31

Gideon v. Wainwright, 372 U.S. 335 (1963) 5, 16, 32

Hardwick v. Crosby, 320 F.3d 1127 25

Harrington v. Richter, 131 S. Ct. 770 (2011) 6, 19

Ex parte Hinton, 548 So. 2d 562 (Ala. 1989) 7, 22

Ex parte Hinton, No. 1051390, 2008 WL 4603723 (Ala. Oct. 17, 2008) ..... passim

Ex parte Hinton, No. 1110129, 2012 WL 5458542 (Ala. Nov. 9, 2012) 1, 15

Ex parte Hinton, No. 1110129 (Ala. Apr. 19, 2013) 1, 2, 3, 16

Hinton v. State, 548 So. 2d 547 (Ala. Crim. App. 1988) 22

Hinton v. State, No. CR-04-0940, 2006 WL 1125605
(Ala. Crim. App. Apr. 28, 2006) ..... passim

Hinton v. State, No. CR-04-0940, 2008 WL 5517591
(Ala. Crim. App. Dec. 19, 2008) 1

Hinton v. State, No. CR-04-0940, 2011 WL 3780644
(Ala. Crim. App. Aug. 26, 2011) 29, 31

Hinton v. State, No. CR-04-0940, 2013 WL 598122
(Ala. Crim. App. Feb. 15, 2013) 1, 2, 16

Johnson v. Mississippi, 486 U.S. 578 (1988) 31

Kimmelman v. Morrison, 477 U.S. 365 (1986) 24

Lawrence v. Florida, 549 U.S 327, 329 (2007) 6

Martinez v. Ryan, 132 S. Ct. 1309 (2012) 32

McMann v. Richardson, 397 U.S. 759 (1970) 17

Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009) 16

Ex parte Monk, 557 So. 2d 832 (Ala. 1989) 31

Rompilla v. Beard, 545 U.S. 374 (2005) 30

Starr v. Lockhart, 23 F.3d 1280 (8th Cir. 1994) 31

Strickland v. Washington, 466 U.S. 668 (1984) ..... passim

Wilson v. Greene, 155 F.3d 396 (4th Cir. 1998) 30

Wiggins v. Smith, 539 U.S. 510 (2003) 24

Williams v. Illinois, 132 S. Ct. 2221 (2012) 16

Williams v. Taylor, 529 U.S. 362 (2000) 25

Wilson v. Gaetz, 608 F.3d 347 (7th Cir. 2010) 31

STATUTES

28 U.S.C. § 1257(a) 2

28 U.S.C. § 2244(d) 6

Ala. Code § 15-12-21 ..... 7, 10, 23

OTHER AUTHORITIES

Adina Schwartz, A Systemic Challenge to the Reliability and Admissibility of Firearms and Toolmark Identification, 6 Colum. Sci. & Tech. L. Rev. 2 (2004-2005) 9

Brandon L. Garrett & Peter J. Neufeld, Invalid Forensic Science Testimony and Wrongful Convictions, 95 Va. L. Rev. 1 (2009) 17

Attorney General Eric Holder, Address at the American Film Institute's Screening of Gideon's Army (June 21, 2013) 32

Nat'l Registry of Exonerations: A Joint Project of Michigan Law and Northwestern Law 17

Paul C. Giannelli, Ballistics Evidence: Firearms Identification, 27 Crim. L. Bull. 195, 197 (1991) 9

Statement of Interest of the United States, Wilbur v. City of Mount Vernon, No. C11-1100RSL (W.D. Wa. Aug. 14, 2013) 32

PETITION FOR WRIT OF CERTIORARI

Anthony Hinton respectfully petitions for a writ of certiorari to review the judgment of the Alabama Court of Criminal Appeals.

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals, Hinton v. State, No. CR-04-0940, 2006 WL 1125605 (Ala. Crim. App. Apr. 28, 2006), is unreported and is attached as Appendix A, along with that court's denial of rehearing. The order of the Alabama Supreme Court remanding for additional findings, Ex parte Hinton, No. 1051390, 2008 WL 4603723 (Ala. Oct. 17, 2008), is attached as Appendix B. The Order of the Alabama Court of Criminal Appeals remanding to the circuit court, Hinton v. State, No. CR-04-0940, 2008 WL 5517591 (Ala. Crim. App. Dec. 19, 2008), along with its Order on return to remand on August 26, 2011, and rehearing denial on October 21, 2011, is attached as Appendix C. The Order of the Alabama Supreme Court remanding for further compliance with its remand order, Ex parte Hinton, No. 1110129, 2012 WL 5458542 (Ala. Nov. 9, 2012), is attached as Appendix D. The order of the Alabama Court of Criminal Appeals complying with the remand, Hinton v. State, No. CR-04-0940, 2013 WL 598122 (Ala. Crim. App. Feb. 15, 2013), is attached as Appendix D. The order of the Alabama Supreme Court denying a petition for a writ of certiorari to review the judgment of the Alabama Court of Criminal Appeals, Ex parte Hinton, No. 1110129 (Ala. Apr. 19, 2013), is unreported and is attached as Appendix F.

JURISDICTION

The initial judgment of the Alabama Court of Criminal Appeals was issued on April 28, 2006. Hinton v. State, No. CR-04-0940, 2006 WL 1125605 (Ala. Crim. App. Apr. 28, 2006). On October 17, 2008, the Alabama Supreme Court reversed and remanded for additional findings, Ex parte Hinton, No. 1051390, 2008 WL 4603723 (Ala. Oct. 17, 2008). On February 15, 2013, the Alabama Court of Criminal Appeals on return to second remand affirmed the trial court's denial of postconviction relief, Hinton v. State, CR-04-0940, 2013 WL 598122 (Ala. Crim. App. Feb. 15, 2013), and the Alabama Supreme Court denied Mr. Hinton's timely Petition for Writ of Certiorari to the Alabama Court of Criminal Appeals on April 19, 2013. Ex parte Hinton, No. 1110129 (Ala. Apr. 19, 2013). On July 15, 2013, Justice Thomas extended to and including September 16, 2013, the time for filing this petition for writ of certiorari. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . . and to have the Assistance of Counsel for his defence.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Anthony Ray Hinton has been on Alabama's death row for 27 years for two murders he adamantly maintains he did not commit. There is compelling evidence supporting his claim of innocence which has divided lower courts. A three-member majority of the Court of Criminal Appeals affirmed his conviction over strong dissents criticizing the majority for failing to respond to the vast evidence that a miscarriage of justice has occurred. Hinton v. State, No. CR-04-0940, 2006 WL 1125605, at *66 (Ala. Crim. App. Apr. 28, 2006) (Cobb, J., dissenting) ("There exists ample evidence that the adversarial system suffered a severe breakdown here because of trial counsel's ignorance of the law and his resulting decision to retain an unqualified witness. As a result, the confidence in the outcome of Hinton's trial has been seriously undermined."); id. at *70 (Shaw, J., dissenting) ("I am concerned that confidence in the outcome of Hinton's trial was seriously compromised by the failure of trial counsel to seek the additional funding to which he was entitled."). In a narrowly divided 4-3 order, the Alabama Supreme Court also denied further review of this case. Ex parte Hinton, No. 1110129 (Ala. Apr. 19, 2013). This petition follows.

In this case, the State conceded at trial that without scientific testimony linking gun evidence from three separate crimes, Alabama could not convict Anthony Ray Hinton of capital murder and a judgment of acquittal would be required. Because the charges against Mr. Hinton involved two separate robbery-murders that occurred

months apart with no evidence linking Mr. Hinton to either crime other than the State's gun evidence, the trial court took the unprecedented step of sua sponte consolidating the separate crimes into a single trial. The State's ability to link these two murders required evidence from a third attempted robbery-murder where the victim survived. The trial judge appointed counsel to Mr. Hinton who was thus required to defend against three distinct crimes – capital murder charges in two separate cases occurring nearly five months and eleven miles apart, as well as evidence from a third attempted murder case. Although Alabama law authorized the appointment of two lawyers for a capital murder case, the judge appointed just one lawyer whose out-of-court compensation was limited by statute to $1000.

Because the State's case against Mr. Hinton rested entirely on testimony from two experts that a gun seized from Mr. Hinton's mother fired the bullets recovered from all three crime scenes, Mr. Hinton's defense required expert assistance from a firearms identification examiner. Mr. Hinton's appointed counsel believed he had only $500 for expert assistance and could not find an expert examiner to assist him for that little money. Instead, he presented testimony from a civil engineer who had was inadequately trained and skilled in firearms identification. This engineer, who was partially blind, admitted at trial that he did not know how to operate the standard comparison microscope used in firearms identification and was thoroughly discredited and mocked by state prosecutors. The jury deliberated less than two hours before finding Mr. Hinton guilty of both capital murders.

In collateral proceedings, Mr. Hinton presented compelling evidence from

experienced firearm identification experts who testified that there was no evidence to support the State's claim that the bullets recovered from the three crimes came from a single weapon. Experts also testified that there was no evidence that could support the State's claim that bullets could be matched to the Hinton weapon. Two experts testified that there was evidence that mechanically excluded the Hinton weapon from the bullets recovered from at least one of the crimes. Finally, the experts pointed out defects and deficiencies in the State's prior testing that were evident in the testing notes and documents prepared by the State's examiners in support of their findings. Additional evidence supporting Mr. Hinton's claim of innocence was presented below, including details about Mr. Hinton's compelling alibi which contradicted a finding of guilt. State prosecutors nonetheless wrote a 144-page order which made detailed findings against Mr. Hinton and denied relief. Two years later, following repeated motions from Mr. Hinton seeking a ruling, the trial judge adopted the State's order verbatim.

This case raises fundamental questions about the right to counsel in this country when the government's criminal case rests exclusively on scientific evidence, a phenomenon which has dramatically increased in frequency since this Court last addressed the parameters of the right to counsel in Gideon v. Wainwright, 372 U.S. 335 (1963) fifty years ago. Because most claims of ineffective assistance of counsel are not typically presented until state collateral proceedings, many petitioners are unable to seek certiorari review in this Court following state court litigation, due to the federal

statute of limitations for federal habeas review.[1] This case presents the Court with an uncommon opportunity to address the requirements of the Sixth Amendment in a posture outside of federal habeas corpus proceedings where review is constrained by the standards created by this Court's habeas corpus jurisprudence and those imposed by the Anti-Terrorism and Effective Death Penalty Act. See Harrington v. Richter, 131 S. Ct. 770 (2011).

A. Facts

Anthony Ray Hinton was arrested in his mother's front yard on July 31, 1985, after Sidney Smotherman, manager of Quincy's restaurant in Bessemer, Alabama, picked Mr. Hinton out of a photo line-up as a suspect in a robbery at Quincy's on July 26, 1985. (R. 1168-69, 1986-87.)[2] Police searched Mrs. Beulah Hinton's home and took her old .38-caliber revolver. (R. 1161, 1173, 1179.) Firearms identification examiners employed by the Alabama Department of Forensic Sciences tested the gun and said it fired not only the two bullets recovered from the Quincy's crime, but also bullets from two earlier robbery-murders: the fatal shooting of Mrs. Winner's restaurant manager John Davidson in Birmingham on February 23, 1985, and that of Captain D's restaurant manager Thomas Wayne Vason in Woodlawn on July 1, 1985. (R. 1233-34,

---

[1] Lawrence v. Florida, 549 U.S 327, 329 (2007) (filing petition for certiorari in the United States Supreme Court after state court enters final judgment on collateral review does not toll 1-year statute of limitations for seeking federal habeas corpus relief from a state-court judgment under 28 U.S.C. § 2244(d)).

[2] References are to the appellate record below in this case. "PH." refers to the preliminary hearing transcript. "R." refers to the trial transcript. "PC." refers to the clerk's record in the state postconviction proceedings. "PR." refers to the transcript of the postconviction hearing.

1282.) The assertion that all six recovered bullets were fired from the same weapon was the sole evidentiary basis for the State's theory that the same person who attempted to kill Mr. Smotherman killed Mr. Davidson and Mr. Vason.

Anthony Hinton was charged with two counts of capital murder and was too poor to afford a lawyer. The trial court appointed one lawyer, Sheldon Perhacs (R. 74), whose compensation for out-of-court work was capped at $1000. Ala. Code § 15-12-21.[3] The trial court took the unprecedented step of sua sponte consolidating two separate capital murder cases into a single trial. Ex parte Hinton, 548 So. 2d 562, 566 (Ala. 1989). To prove the two capital murder charges, the State relied on evidence of the uncharged Quincy's robbery, which meant a single lawyer had to defend against three separate cases. Appointed counsel tried to obtain compensation for each of the capital murder cases but his fee declaration was rejected. He was paid a total of $1600 for his work at trial.[4]

Anthony Hinton, twenty-nine years old with no history of violent crime, steadfastly maintained his innocence. There were no eyewitnesses to either murder and fingerprints from each crime scene did not match Mr. Hinton. (R. 1984-86.) A

---

[3]The cap on compensation in death penalty cases for out-of-court time was eliminated in 1999. Ala. Code § 15-12-21(d).

[4]Mr. Perhacs was paid a total of $1600 for representing Mr. Hinton. (PR. 179.) He testified in postconviction proceedings that Mr. Hinton's defense "require[d] a lot of time and effort" because "[t]wo capital cases were combined for trial, but they were all contingent upon the occurrence of a third event which was a robbery at Quincy's." (PR. 180); see also Hinton v. State, No. CR-04-0940, 2006 WL 1125605, at *26-27 (Ala. Crim. App. Apr. 28, 2006) (Perhacs testified "that was not adequate compensation because he spent much more time than that trying the case; that the case required a lot of effort because he was, in effect, defending three cases at one time; and that he tried to get compensated for the two capital cases, but his fee declaration was rejected").

polygraph test given by police exonerated him of any involvement in these crimes but the trial court refused to admit it into evidence. (R. 1868-70, 1953-54, 2025-28, 2150-53.) Mr. Hinton was working in a secure warehouse facility fifteen miles away at the time of the Quincy's robbery. (R. 1023, 1345, 1350, 1393-98.) Witnesses at trial and in postconviction proceedings testified that he received his work assignment for that night at about 12:10 a.m. (R. 1396, 1398) and that it was physically impossible for him to travel fifteen miles to Quincy's in time to wait for the manager as he left the restaurant at 12:14 a.m. (R. 1812, 1809-10, 1146.)

In fact, "the only evidence linking Hinton to the two murders were forensic comparisons of the bullets recovered from those crime scenes to the Hinton revolver." Ex parte Hinton, No. 1051390, 2008 WL 4603723, at *2 (Ala. Oct. 17, 2008). The State conceded at trial that, without a weapon match, there is no basis to believe that Anthony Hinton is guilty of these offenses. At the suppression hearing, the prosecutor told the judge "if the evidence of the firearms experts of the State of Alabama is not sufficient then, of course, a judgment of acquittal would lie." (R. 836.) The trial court likewise recognized that a judgment for acquittal would be appropriate if the State could not prove a toolmark match first between the three crimes and secondly with the Hinton weapon. (R. 827-28) ("[K]nowing what the evidence is alleged to be by the State, it's going to be relevant only at the time that it's linked by the State's [firearm] expert testimony, so up until that time relevancy wouldn't really be a problem because a motion for a judgment of acquittal would lie.").

Trial counsel recognized that his ability to confront the State's case and

establish Mr. Hinton's innocence depended on obtaining the assistance of a skilled, competent firearms identification examiner[5] who would be "a pivotal witness" for the defense. (R. 55.) Counsel told the court prior to trial:

> The problems are worse trying to go to trial without an expert, because no matter what anybody says about anything, this case would not get off the ground if there wasn't a ballistics comparison.

(R. 63.) Counsel later testified that he knew expert evidence was "[c]ritical to the case" because "[w]ithout a ballistics comparison that was positive, there could have been no matching of the evidence." (PR. 181); see also Hinton, 2006 WL 1125605, at *27 ("Perhacs testified that firearm and toolmark examination was critical to the case because the three crimes could not be connected without it.")

The trial court pre-approved only $500 per case for expert assistance. (R. 2118.) While trial counsel complained that it was not possible to find an expert for $500, trial counsel believed that he could not get more than $500 from the court and did nothing to obtain additional funds. (R. 62, 65, 71; PR. 181, 207.) Trial counsel's belief that he could not get more than $500 to hire an expert under Alabama law was incorrect. With minimal research, counsel would have learned that at the time of Mr. Hinton's trial,

---

[5] Toolmark examination or firearms identification is sometimes referred to as "ballistics identification," but that term is improper because ballistics deals with the motion of projectiles. See Paul C. Giannelli, Ballistics Evidence: Firearms Identification, 27 Crim. L. Bull. 195, 197 (1991).

> Firearms identification is a subspecies of toolmark identification dealing with the toolmarks that bullets, cartridge cases, and shotshell components acquire by being fired and that unfired cartridge cases and shotshells acquire by being worked through the action of a firearm.

Adina Schwartz, A Systemic Challenge to the Reliability and Admissibility of Firearms and Toolmark Identification, 6 Colum. Sci. & Tech. L. Rev. 2 (2004-2005).

Alabama law provided reimbursement to appointed counsel for any expenses reasonably incurred in the defense of his client, "to be approved in advance by the trial court." Ala. Code § 15-12-21(d). Mr. Hinton was also entitled to sufficient funds to hire a competent expert pursuant to Ake v. Oklahoma, 470 U.S. 68 (1985). Moreover, the trial court explicitly invited counsel to seek additional funds if necessary:

> I don't know as to what my limitations are as for how much I can grant, but I can grant up to $500.00 in each case as far as I know right now and I'm granting up to $500.00 in each of these two cases for this. So if you need additional experts I would go ahead and file on a separate form and I'll have to see if I can grant additional experts, but I am granting up to $500.00, which is the statutory maximum as far as I know on this and if it's necessary that we go beyond that then I may check to see if we can, but this one's granted.

(R. 10-11.)[6]

At trial, the State presented testimony from two Alabama Department of Forensic Sciences firearms examiners that the bullets recovered from all three crimes were (1) fired from the same weapon, and (2) that Mr. Hinton's mother's revolver was the weapon that fired all of the bullets. (R. 1233-34; 1272-73; 1281-89.) To dispute the State's expert evidence of a match, defense counsel presented Andrew Payne, who admitted on cross-examination that he was an engineer – not a firearms identification examiner – and that his experience with weapons was limited to a six- or nine-month stint developing .50-caliber artillery guns for the Air Force twenty years earlier when

---

[6]"Although Ala. Code § 15–12–21(d) previously limited expert fees to $500, Act No. 84–793, 1984 Ala. Acts 1st Ex.Sess., p. 198, effective June 13, 1984, amended that section to provide reimbursement to appointed counsel for any expenses reasonably incurred in the defense of his/her client, 'to be approved in advance by the trial court.'" Hinton v. State, No. CR-04-0940, 2006 WL 1125605, at *30 n.29 (Ala. Crim. App. Apr. 28, 2006).

he was in the military. (R. 1641-42.) Payne testified he was not a member of any professional firearms identification organization; he belonged only to the engineering – not toolmarks – section of the American Academy of Forensic Sciences. (R. 1642.)

Payne admitted that he never test-fired the Hinton firearm (R. 1657) – a step which toolmark examiners consider necessary. (PR. 74.) Worse, due to his lack of skill and poor vision, he told the jury that he was unable even to see the bullets through the microscope without help from the State's experts:

> Q. As a matter of fact when you were looking at the Smotherman projectile there at the laboratory of the Department of Forensic Sciences you had to ask Mr. Yates how to cut on the light source for the comparison microscope, did you not?
>
> A. Very possible, in fact, probably did, yes.
>
> Q. And as a matter of fact after he told you how to do it you reached over to your immediate right and threw the switch on an electric inscribing tool that was on a shelf next to the microscope, did you not?
>
> A. Very possible; yes, sir.
>
> . . .
>
> Q. That's a little device that's – a hand-held device about six or seven inches long that has a simply switch on it with a hard carbide tip that vibrates and a cord that comes off the back.
>
> . . .
>
> Q. And as a matter of fact, you did not know how to manipulate the dual stages on the comparison microscope, did you?
>
> A. I had to learn for the first time on American Optical while I was there, that's true.
>
> . . .

Q. All right. And then you were unaware of whether or not there was any type of slow motion controls to raise the stage up and down?

A. I didn't know where they was. I asked Mr. Yates to tell me which he – well, I won't go into that.

(R. 1650-52.) The jury heard from Payne himself that, because he did not know how to use the microscope, for most of his examination he could not even see the bullets under the microscope. After spending twenty minutes looking for the bullets he eventually got so exasperated that he said "Hell, I can't even find it" and had to ask the State's examiner, Lawden Yates for help:

Q. Then over a process of ten minutes as you attempted to do that, you finished that period of time by saying, Hell, I can't even find it?

A. That's probably true, that's right.

Q. Followed up next by saying, I don't know how to operate the machine on immediate power, will someone please help me?

A. That's right. I asked Mr. Yates to, please, tell me how to operate that particular aspect of the microscope. I might add that he refused to do so.

. . .

Q. . . . Did you say, I don't seem to be able to see the bullet. I can see the mirror and I can see my finger fine?

A. It's very possible that I said that. That would be one of the problems you would have when you were trying to locate the higher power glass and that's why I asked for the instructions.

Q. And then at the end of 20 minutes from the time you switched the turret lens at approximately 11:40, you said, there you are, I was too far to the right?

A. . . . I wouldn't dispute that.

(R. 1653-54.)

The prosecutor concluded his cross-examination by exposing the fact that Payne was physically incapable of performing the requisite testing in this case:

Q. Mr. Payne, do you have some problem with your vision?

A. Why, yes.

Q. How many eyes do you have?

A. One.

(R. 1667.)

The State successfully characterized Payne as a fraud with no relevant training, skill, or experience necessary to evaluate the evidence. With much support, the State characterized Payne to the jury as a "one-eyed" "charlatan," who employed "totally, totally inappropriate" techniques in his examination, who "didn't have a clue" about how to use a comparison microscope, and whose claims to be an expert were so "incredible and irresponsible" that the prosecutor found his testimony "startling and disturbing, alarming and almost sickening." (R. 1728-33.) As the State repeatedly emphasized, "a consulting engineer, ladies and gentlemen, is not a firearms and tool marks expert, and he's no expert. No expert at all." (R. 1727.) After deliberations lasting less than two hours, Mr. Hinton was convicted of two counts of capital murder and sentenced to death. (R. 1857-61, 1993.)

At his state postconviction hearing, Mr. Hinton presented testimony from three experienced firearms examiners whose qualifications the State conceded. (PR. 64, 114, 135.) Each testified that independent microscopic examinations of the six recovered

bullets established that they could not all be linked to a single weapon (PR. 68, 73-74, 116-17, 140-43). This unrebutted testimony alone discredited the state's theory of guilt. The experts additionally testified that the revolver recovered from Mr. Hinton's mother could not be matched with the recovered bullets. (PR. 77, 119, 143-44.) The examiners' testimony that the recovered bullets could not be linked to a single weapon discredited the State's theory, destroyed the State's only link between the Smotherman shooting and the Vason and Davidson murders, and was powerful evidence of Mr. Hinton's innocence. Two of the experts additionally performed tests which showed that the bullets from the Smotherman crime could not have been fired from the Hinton weapon. (PR. 120-21; see also PR. 86, 123.)[7]

Additional evidence demonstrating Mr. Hinton's innocence was also presented at the Rule 32 hearing, including evidence that Mr. Hinton could not have committed the kidnapping and robbery of Mr. Smotherman at the Quincy's restaurant because it was undisputed that he was fifteen miles away from Quincy's at 12:10 a.m. (R. 1023, 1396). Witnesses testified that whoever committed the Smotherman crime had to have planned to arrive at the Quincy's restaurant before 11:00 p.m. because Mr. Smotherman frequently closed and left the restaurant as early as 11:00 p.m. (PR. 152, 167-68.) Additional evidence was presented discrediting witness identification of Mr. Hinton as the man who committed the Smotherman crime.

Trial counsel testified that he believed Andrew Payne was not an expert in the

---

[7]In light of this new evidence, the State has been asked repeatedly to re-examine its evidence against Mr. Hinton and, in violation of toolmark examiners' ethical requirements, its experts refused. (PR. 106-07.) The State never has offered any evidence to rebut the new evidence.

area of firearm and toolmark examination (PR. 188-89) and admitted his deficient performance by acknowledging that his inability to present a competent firearms identification examiner "was my failure, my inability under the statute to obtain any more funding for the purpose of hiring qualified experts." (PR. 207); see also Hinton, 2006 WL 1125605, at *27 (trial counsel testified that Payne "did not have the expertise he thought he needed and that he did not consider Payne's testimony to be effective").

The prosecutor wrote a 144-page proposed order concluding on this issue that "Hinton fails to meet his burden of pleading or proving that his counsel was deficient or how he was prejudiced when the expert chosen by trial counsel testified to what he claims any other 'qualified' ballistics expert would have testified," which the trial judge adopted verbatim on January 18, 2005, and the Alabama Court of Criminal Appeals adopted verbatim in significant part in its divided 3-2 decision denying postconviction relief. (PC. 1050-1194, 1510-1651); Hinton, 2006 WL 1125605, at *27-28.

B. Procedural History and the State Court Ruling on Review

Anthony Hinton filed a timely application for rehearing, which was denied, and then timely petitioned the Alabama Supreme Court for a writ of certiorari to review the decision of the Alabama Court of Criminal Appeals. On October 17, 2008, the Alabama Supreme Court reversed and remanded for additional findings, Ex parte Hinton, No. 1051390, 2008 WL 4603723 (Ala. Oct. 17, 2008).

After its first decision on return to remand was reversed by the Alabama Supreme Court, Ex parte Hinton, No. 1110129, 2012 WL 5458542 (Ala. Nov. 9, 2012), the Alabama Court of Criminal Appeals on February 15, 2013, affirmed the trial

court's denial of postconviction relief on return to second remand, Hinton v. State, No. CR-04-0940, 2013 WL 598122 (Ala. Crim. App. Feb. 15, 2013).

A divided Alabama Supreme Court denied Mr. Hinton's timely Petition for Writ of Certiorari to the Alabama Court of Criminal Appeals on April 19, 2013. Ex parte Hinton, No. 1110129 (Ala. Apr. 19, 2013) (four justices voted to deny review; three dissented; and two recused themselves due to their prior service on the lower appellate court). This petition follows.

REASONS FOR GRANTING THE WRIT

I. WITH INCREASING FREQUENCY, CRIMINAL PROSECUTIONS IN THIS COUNTRY ARE DEPENDENT ON SCIENTIFIC EVIDENCE WHICH OFTEN PROVIDES THE SOLE BASIS FOR A CRIMINAL CONVICTION. THIS COURT SHOULD REVIEW WHAT THE SIXTH AMENDMENT REQUIRES FROM DEFENSE COUNSEL TO PROVIDE CONSTITUTIONALLY EFFECTIVE ASSISTANCE IN SUCH A CASE AND WHETHER THE FAILURE TO OBTAIN A SKILLED, COMPETENT SCIENTIFIC EXPERT VIOLATES THE SIXTH AMENDMENT.

Since this Court's decision in Gideon v. Wainwright, 372 U.S. 335 (1963), criminal prosecutions have become more dependent on scientific evidence presented through expert testimony from a range of state forensic and scientific specialists.[8] While scientific evidence has clearly increased the reliability of criminal prosecutions in many instances, without skilled confrontation by defense experts, the introduction of unchallenged scientific evidence in a criminal case has also been a significant factor

---

[8] See Williams v. Illinois, 132 S. Ct. 2221, 2275 (2012) (Thomas, J., concurring) (recognizing that "scientific evidence plays a larger and larger role in criminal prosecutions"); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 319, 320 (2009) (noting "[s]erious deficiencies have been found in the forensic evidence used in criminal trials," even though "forensic evidence [is] commonly used in criminal prosecutions").

in many wrongful convictions.[9] This Court has always made clear that the right to counsel "is the right to the effective assistance of counsel," Strickland v. Washington, 466 U.S. 668, 686 (1984) (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)), and that "access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." Id. at 685 (quoting Adams v United States ex rel. McCann, 317 U.S. 269, 275 (1942)). As such, the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id, 466 U.S. at 686.

The Court of Criminal Appeals below found that trial counsel's reliance on a "qualified" expert automatically shielded trial counsel's performance from this Sixth Amendment review. Petitioner contends that this judgment conflicts with this Court's long-established precedents and provides this Court with an opportunity to address this critically important issue.

What the Sixth Amendment requires when the state seeks a conviction and death sentence against an indigent accused based entirely on scientific evidence or

---

[9]See Nat'l Registry of Exonerations: A Joint Project of Michigan Law and Northwestern Law, http://www.law.umich.edu/special/exoneration/Pages/browse.aspx (last visited Sept. 16, 2013) (citing false or misleading forensic evidence as a contributing factor in wrongful convictions for 266 of 1,209 known exonerations since 1989); Brandon L. Garrett & Peter J. Neufeld, Invalid Forensic Science Testimony and Wrongful Convictions, 95 Va. L. Rev. 1 (2009) (reviewing trial transcripts of exonerees and finding that sixty percent (80 of 137) of cases involved state forensic experts who provided testimony misstating or wholly unsupported by empirical data, with defense counsel rarely challenging this testimony through cross-examination or defense experts of their own).

forensic testimony is a question of growing importance. There is no dispute that the mechanical engineer who defense counsel relied on in this case had no experience in the field of forensic firearms identification, despite the centrality of the issue. See Hinton, 2006 WL 1125605, at *62 (Cobb, J., dissenting) ("Payne was a civil engineer, not a firearms and toolmark investigator, and [] he received his engineering degree in 1933, more than 50 years before Hinton's trial. (TR. 1571-72.) He spent many years in the military and worked with weapons, but he testified that his duties included 'working on various bombs and fuses and then designing delivery schemes with bombs for certain specialized targets' and being the 'project officer for the .60 caliber machine gun.'" (TR. 1573, 1575.)).

A divided lower court concluded that the Sixth Amendment question of counsel's effectiveness turned only on whether the defense expert's testimony met some minimal standard for admissibility under state evidentiary rules. The dissent strongly disagreed:

> In all my tenure on the bench, I have never seen the State successfully prosecute a capital-murder case when the only evidence of guilt consisted of testimony by a firearms and toolmark expert. This was an amazing prosecutorial feat, which could have been tested if Hinton had received effective representation and had been provided full and complete discovery. Hinton received neither.

Hinton, 2006 WL 1125605, at *69 (Cobb, J., dissenting).

Petitioner contends that under Strickland and its progeny, defense counsel's failure to obtain and present a competent firearms identification expert in a case where forensic evidence is dispositive is objectively unreasonable and violates the Sixth

Amendment.

A. Trial Counsel's Performance with Respect to the Only "Reasonable and Available Defense Strategy" Was Unreasonably Deficient.

While there are typically many ways reasonably effective counsel might decide to defend a case, this case belongs to a separate category of criminal cases where the state's evidence of guilt relies entirely on scientific evidence. Harrington v. Richter, 131 S. Ct. 770, 788 (2011) ("Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both."). There is no dispute in this case that the only "reasonable and available defense strategy" required the assistance of a competent firearms identification examiner.

At trial, there was no dispute that Mr. Hinton could not have been convicted for capital murder but for testimony from the State's firearms identification experts that bullets recovered from three crime scenes were fired from a single weapon and that weapon was the gun recovered from Mr. Hinton's mother. The State conceded before and during trial that there is no connection between Mr. Hinton and the murders of John Davidson and Thomas Wayne Vason unless there is a toolmark match between the bullets recovered from those crime scenes and the gun recovered from the home of Mr. Hinton's mother. (R. 836; see also R. 33-34, 423-26, 827-28.)

At the preliminary hearing, the State's witness, Sergeant Howard Miller, testified:

Q. Let me make sure I understand, the only thing insofar as your

investigation is concerned that connects my client to this case is the report that you have the bullets obtained from these two separate locations and they appear to match the gun that was obtained by Lieutenant Acker?

A. Yes, sir.

Q. That's it?

A. From the three locations, yes, sir.

(PH. 54.)

The prosecutor told the trial court, "if the evidence of the firearms experts of the State of Alabama is not sufficient then, of course, a judgment of acquittal would lie." (R. 836.) The prosecutor acknowledged that "the gun is key to the identification of this defendant, there being no eye witnesses in either the case involving the killing of John Davidson at Mrs. Winner's or in the case involving Wayne Vason at Captain D's." (R. 33-34.) He reiterated that the only thing that ties Anthony Ray Hinton to the capital crimes "is the fact that the gun was used in all three instances." (R. 34.)

In opening argument, the State told the jury that without a toolmarks match, there would be no conviction – indeed, no prosecution. (R. 423-24.) The State repeatedly emphasized to the jury that when suspects were arrested in connection with these offenses, but test results did not match the suspect's weapon with the crime, the police "ordered them released on the murder charge." (R. 1792-94; see also R. 1724: "The same day, later, a pistol was turned in to be checked against here. They looked at it, no comparison, no match, wrong gun.")

The trial court likewise recognized that a judgment for acquittal would be

appropriate if the toolmarks evidence did not match. (R. 827-28: "knowing what the evidence is alleged to be by the State, it's going to be relevant only at the time that it's linked by the State's [toolmarks] expert testimony, so up until that time relevancy wouldn't really be a problem because a motion for a judgment of acquittal would lie.")

Trial counsel also recognized that "this case would not get off the ground if there wasn't a ballistics comparison." (R. 63.) At the Rule 32 hearing, counsel testified that "[w]ithout a ballistics comparison that was positive, there could have been no matching of the evidence." (PR. 181; see also PR. 189: "without the corroboration of the ballistics, the balance of the case collapsed.")

Indeed, the trial court, the Alabama Court of Criminal Appeals, and the Alabama Supreme Court all initially affirmed Mr. Hinton's guilt based on the factual assertion of a weapons match, which each court accepted on direct appeal as entirely reliable.[10]

As the State, trial court, trial counsel, and appellate courts all have recognized, without a weapon match, Mr. Hinton would not have been prosecuted for the capital murders of Davidson and Vason, much less convicted. Accordingly, if trial counsel had

---

[10]See R. 1985-87 (trial court finding that the "38 caliber bullets which were recovered from both victims were later compared to determine if they had been fired from the same weapon and determination was made, in fact, that they were fired from the same weapon" and that "a determination was made from the Department of Forensic Sciences that the pistol recovered from the defendant's home was the weapon that had fired the fatal bullets into the bodies of Thomas Wayne Vason and John Davidson, and also the weapon that had been used in the robbery and the attempted murder of Sidney Smotherman."); Hinton v. State, 548 So. 2d 547, 553 (Ala. Crim. App. 1988) ("The gun recovered at the defendant's home was . . . the weapon through which all of the bullets recovered from these three robbery investigations were fired.") and at 558 ("The same weapon was used in each incident."); Ex parte Hinton, 548 So. 2d 562, 569 (Ala. 1989) ("[T]he bullets from all three crimes came from the gun taken from the defendant's house.") and at 565 ("[T]he .38 caliber gun given to the police was the same gun that had fired the bullets that had killed Davidson and Vason and that had injured Smotherman.").

presented competent evidence establishing that the bullets from the three separate crime scenes cannot be linked to a single weapon *or* cannot be matched to Beulah Hinton's gun, there unquestionably is a reasonable probability that Mr. Hinton would have been acquitted.

Under these circumstances, it would have been obvious to any reasonably effective lawyer that the assistance of a skilled, experienced, and competent toolmark expert was crucial. Yet, despite knowing that a competent expert was indispensable to Mr. Hinton's defense, counsel did not obtain one. At a pretrial hearing, trial counsel told the court that he doubted Payne was a qualified expert but that he nonetheless felt "stuck" with him. (R. 71.) Similarly, at the postconviction hearing, trial counsel testified that he knew that a competent toolmark expert was "[c]ritical to the case" and that he believed that Andrew Payne was not an expert in the area of firearm and toolmark examination. (PR. 181, 188-89.)

The record is clear that counsel's decision was not due to strategic considerations but due to the unprecedented financial constraints he faced and his failure to obtain additional necessary funding. Counsel admitted in his Rule 32 testimony that his failure to present a competent toolmark examiner was not the result of strategy but instead was "my failure, my inability under the statute to obtain any more funding for the purpose of hiring qualified experts." (PR. 207.) Trial counsel's belief that the statute limited him to $500 to hire an expert was incorrect. With minimal research, counsel would have learned that at the time of Mr. Hinton's trial, Alabama law provided reimbursement to appointed counsel for any expenses reasonably incurred in

the defense of his client. Ala. Code § 15-12-21(d).

Counsel's failure to research the relevant law is inexplicable in light of the trial court's invitation to seek additional funding and to research the relevant law. While the court pre-approved only $500 per case for expert assistance, the court informed counsel that Mr. Hinton might be entitled to more money, and explicitly invited counsel to seek additional funds should they be necessary:

> I don't know as to what my limitations are as for how much I can grant, but I can grant up to $500.00 *in each case* as far as I know right now and I'm granting up to $500.00 in *each of these two cases* for this. So if you need additional experts I would go ahead and file on a separate form and I'll have to see if I can grant additional experts, but I am granting up to $500.00, which is the statutory maximum as far as I know on this and if it's necessary that we go beyond that then I may check to see if we can, but this one's granted.

(R. 10-11) (emphasis added).

While competent counsel would have asserted that he was entitled to sufficient funds to hire a competent expert pursuant to Ake v. Oklahoma, 470 U.S. 68 (1985), or corrected the court's erroneous belief that the statute limited funds for experts to $500, trial counsel did not do so. Instead of researching the law to learn what assistance Mr. Hinton was entitled to, trial counsel believed he would have to get an expert for $500. In fact, trial counsel believed that he might not have any money to pay an expert, as he had already used the $500 in his attempts to locate one. (R. 62: "And I've also spent enough time that I exceeded the allowance limit just in the time I've been looking for a doggone expert.") As a result, counsel believed that he would have to find "somebody hanging around" – a retired expert who would work for free. (R. 65: "I was looking for

somebody retired, you know, somebody hanging around.")[11]

Believing that his options were limited to someone willing to volunteer their services, counsel decided that Payne was his "only shot." (R. 62.) Counsel's decision to rely on "somebody hanging around" who was willing to testify for free instead of conducting the legal research indicated by the court cannot be considered a reasonable strategic decision entitled to deference. Trial counsel made the mistaken and uninformed assumption that he could not seek more than $500 for expert assistance. Based on that mistaken belief, counsel abandoned his efforts to obtain a competent expert and resigned himself to the false conclusion that he was "stuck [with Payne because] he's the only guy I could possibly produce" for $500. (R. 71.) Counsel's conduct was unreasonable. Strickland, 466 U.S. at 691 ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."); see also Wiggins v. Smith, 539 U.S. 510, 533 (2003) ("'[S]trategic choices made after less than complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation'") (quoting Strickland, 466 U.S. at 690-91); Kimmelman v. Morrison, 477 U.S. 365, 385 (1986) (defense counsel's failure to conduct pre-trial discovery not a strategic decision because it was based on defense counsel's "mistaken belief" that

---

[11]Trial counsel's testimony on this point is corroborated by Payne's testimony at trial. At trial, Payne testified that he was not certain that he would be paid for his services in this case because trial counsel "asked me to assist him as a court appointed attorney and he said I don't know whether you'll receive a fee for your work or not" and that "he just said he didn't know whether he could pay me or not and I said that's all right with me." (R. 1656.)

prosecution was obliged to turn over inculpatory evidence).[12]

As then-Judge Cobb noted in her dissent, "[i]t is axiomatic that effective assistance of counsel requires knowledge of current state law. An attorney's 'lack of knowledge or misunderstanding' of the relevant law 'is not only unacceptable under Supreme Court and circuit law,' but it is 'reprehensible representation in a death-penalty case.'" Hinton, 2006 WL 1125605, at *61 (Cobb, J., dissenting) (quoting Hardwick v. Crosby, 320 F.3d 1127, 1185 n. 207 (11th Cir. 2003)); see also Williams v. Taylor, 529 U.S. 362, 373, 395 (2000) (counsel's failure to investigate and present mitigating evidence based on erroneous belief that "state law didn't permit" access to records held to be ineffective).

B. Counsel's Deficient Performance Was Prejudicial.

Trial counsel performed deficiently with respect to the only reasonable and available defense strategy in this case. "Payne was mocked and represented to be no better than a buffoon and a paid liar. The testimony on the *only* physical evidence that connected Hinton to any of the crimes was useless to him because it was delivered by a witness who not qualified or competent to render the opinions." Hinton, 2006 WL 1125605, at *64 (Cobb, J., dissenting). Had trial counsel obtained the assistance of a qualified, competent toolmark examiner, there exists a reasonable probability of a different outcome at trial. See Williams v. Taylor, 529 U.S. 362, 391 (2000) (prejudice

---

[12]See also Hinton, 2006 WL 1125605, at *60 (Cobb, J., dissenting) ("Trial counsel's beliefs that he was unable to hire a qualified expert because the statute limited the amount of compensation and that he was 'stuck [with Payne because] he's the only guy I could possibly produce' (TR. 71) were incorrect. Trial counsel was limited *only* by his lack of knowledge of the relevant law.").

demonstrated where there is "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different'" (quoting Strickland, 466 U.S. at 694 (1984).).

In contrast with Payne's incredible and incompetent performance at trial, Mr. Hinton presented unrebutted evidence from qualified, competent toolmark examiners at the Rule 32 hearing showing that the State's assertion of a weapons match is wrong.

Lannie Emanuel is a nationally recognized toolmark examiner with the Southwestern Institute of Forensic Sciences in Dallas (Dallas County Crime Laboratory) and prominent member of the Association of Firearms and Toolmark Examiners (AFTE). From 1979 through 1990, he served as a toolmark examiner in the United States Army Criminal Investigation Laboratory System. He testifies ninety-eight to ninety-nine percent of the time for the prosecution. (PC. 1322-23; PR. 64, 105.)

Raymond Cooper has been a toolmark examiner with the Southwestern Institute of Forensic Sciences in Dallas since 1987 and is a former Supervisor of the Firearms Identification, Chemistry, and Latent Print sections of the State of Utah Crime Laboratory. He has been qualified to testify as an expert on firearms and toolmark examination over 250 times. (PC. 1336-37; PR. 114.)

John Dillon is the former chief of the firearm and toolmarks unit of the Federal Bureau of Investigation (FBI) and past president of AFTE (2000-2001). He has had extensive training in toolmark examination, has been doing toolmark examinations since 1976, has trained many other firearm and toolmark examiners, and has testified as an expert in more than seventy cases. (PR. 136-38, 146.)

Mr. Emanuel, Mr. Cooper, and Mr. Dillon each conducted independent microscopic examinations of the six recovered bullets (PR. 68, 73, 119, 140; PC. 2200) and established that the bullets could not be linked to a single weapon. All three testified that none of the recovered bullets, with the exception of the Davidson bullets,[13] could be linked to a single weapon. (PR. 73-74, 116-17, 141-43.)

Mr. Emanuel, Mr. Cooper, and Mr. Dillon also compared the six recovered bullets to the Beulah Hinton weapon using their own test bullets as well as the State's test bullets. (PR. 74, 76, 115-16, 117.) They concluded that the bullets recovered from the crimes could not be matched to the Hinton weapon. (PR. 77, 119, 143-44.)

Mr. Emanuel reported these findings to the State's expert at trial, DFS employee Lawden Yates. (PR. 106.) Mr. Emanuel asked Yates to work with him to resolve their differences, as required by AFTE's ethical rules. (PR. 107.) He asked Mr. Yates to show him what he had seen and what he had used to make his determination that there was a match, but Mr. Yates refused to do so. (PR. 107.)

Having determined that the Smotherman bullets were fired from a weapon that was severely out of time,[14] Mr. Emanuel and Mr. Cooper test-fired the Beulah Hinton weapon in a manner that might allow it to produce a bullet like the Smotherman bullet by manually manipulating the weapon to put it in an extreme out-of-time position.

---

[13]The Davidson bullets were introduced at trial as State's Exs. 2 and 8. (R. 461, 505-06, 1232-33.)

[14]See Pet'r Ex. 9. Mr. Emanuel testified that Petitioner's Exhibit 9 depicts one of the Smotherman bullets alongside the tests fired with the Hinton weapon in its normal firing position. (PR. 78.) The comparison shows that the Smotherman bullet does not have a land and groove signature and the tests do. (PR. 79.) Further, the Smotherman bullet is extruded, indicating that it was produced from a severely out-of-time revolver. (PR. 79, 81.)

(PR. 83, 120.) They concluded that the Smotherman bullets, State's Exhibits 54 and 55, could not have been fired from the Hinton weapon. (PR. 86, 120-21.) Mr. Cooper testified that the Hinton weapon was unable to fire these bullets "because [of] the mechanical ability of this weapon to produce a bullet of that nature." (PR. 123.)

The findings of these qualified and competent experts demonstrate that the recovered bullets can neither be linked to a single weapon nor matched to the Hinton weapon and that the Hinton weapon could not have fired the Smotherman bullets. These findings wholly undermine the State's assertion of a match, and this evidence from any qualified, competent, and experienced expert – in contrast with testimony from an incompetent, inexperienced, one-eyed civil engineer – unquestionably would have resulted in a different outcome at Mr. Hinton's trial.

Indeed, in contrast with its devastating demonstration that Payne lacked any relevant experience, qualifications, and credibility as a toolmarks examiner, the State *stipulated* to the qualifications and experience of the Rule 32 experts, could not impeach their testimony, and presented no evidence in rebuttal to their findings – even though a state toolmarks examiner was present at the hearing. (PR. 59, 64, 114, 135.)

"There exists ample evidence that the adversarial system suffered a severe breakdown here because of trial counsel's ignorance of the law and his resulting decision to retain an unqualified witness. As a result, the confidence in the outcome of Hinton's trial has been seriously undermined." Hinton, 2006 WL 1125605, at *66 (Cobb, J., dissenting); see also id. at *70 (Shaw, J., dissenting) ("I am concerned that confidence in the outcome of Hinton's trial was seriously compromised by the failure

of trial counsel to seek the additional funding to which he was entitled.").

C. The Alabama Court of Criminal Appeals's Analysis Conflicts with the Requirements of the Sixth Amendment and Strickland v. Washington.

In addressing trial counsel's performance in proceeding to trial with a mechanical engineer, the Court of Criminal Appeals did not address the standard set out in Strickland. Instead, it conducted a truncated assessment of the "criterion for admission of expert testimony," Hinton v. State, CR-04-0940, 2011 WL 3780644, at *6 (Ala. Crim. App. Aug. 26, 2011), and, looking exclusively to minimum standards of evidentiary admissibility, found that because Payne's testimony was admissible, counsel's reliance on Payne was *per se* reasonable: "Because Payne was a qualified expert in firearms identification. . ., Hinton's claim that his trial counsel was ineffective for not procuring a qualified firearms-identification expert is meritless." Hinton, 2011 WL 3780644, at *8. The court did not evaluate whether trial counsel's decision to use Andrew Payne was reasonable in light of prevailing professional standards in a death penalty case or in light of the totality of the evidence adduced at trial and in postconviction proceedings as required by Strickland.

The Court of Criminal Appeals reasoned that the Constitution requires nothing more than admissible testimony from someone "who can enlighten a jury more than the average man in the street" – even in a death penalty case. Hinton, 2011 WL 3780644, at *6 (quoting Charles v. State, 350 So. 2d 730 (Ala. Crim. App. 1977)). The court further reasoned that because counsel's decision to hire Payne was informed by the funding restrictions imposed by the court, Mr. Hinton's claim is "completely

without merit . . . because ineffective assistance of counsel is viewed from the actions of counsel and not the actions of the trial court," 2006 WL 1125605, at *55.

The standard for reviewing a claim of ineffective assistance of counsel is of course well-established:

> Ineffective assistance under Strickland is deficient performance by counsel resulting in prejudice with performance being measured against an "objective standard of reasonableness," "under prevailing professional norms."

Rompilla v. Beard, 545 U.S. 374, 380-81 (2005) (internal citations omitted). In addressing trial counsel's performance in proceeding to trial with Andrew Payne, however, the Court of Criminal Appeals did not address the standard set out in Strickland.

Petitioner contends that the admissibility of a witness's testimony is relevant, but it is by no means dispositive when assessing whether counsel's failure to obtain a qualified and credible expert on the single most important issue in a death-penalty trial is deficient and prejudicial.

The Court of Criminal Appeals cited Wilson v. Greene, 155 F.3d 396 (4th Cir. 1998), for the proposition that mere admissibility of expert testimony satisfies the constitutional requirement, articulated in Ake v. Oklahoma, 470 U.S. 68 (1985), that necessary expert assistance be provided to indigent defendants. The Court of Criminal Appeals relied on dicta in Wilson suggesting that the Due Process Clause's standard is not as high as a "malpractice standard" for a court-appointed expert, id. at 402.

Other circuits directly addressing the constitutional standard for expert

assistance, including the Eleventh Circuit, have held that Ake requires more than mere access to any 'expert.' Ford v. Gaither, 953 F.2d 1296, 1299 (11th Cir. 1992) (finding violation of Ake where expert failed to engage in an evaluation that was "appropriate under the circumstances"); Wilson v. Gaetz, 608 F.3d 347, 351 (7th Cir. 2010) (finding that expert "neither conducted an appropriate examination nor assisted meaningfully in evaluation, preparation, and presentation of [the defendant's] insanity defense"); Starr v. Lockhart, 23 F.3d 1280, 1289 (8th Cir. 1994) (overruled on other grounds) ("As Ake explains, due process requires access to an expert who will conduct, not just any, but an appropriate examination.").

More fundamentally, the Court of Criminal Appeals confused the Sixth Amendment right to counsel issue presented in this case with the questions presented by Ake about what the Fourteenth Amendment's due process guarantee of fundamental fairness requires. The Court of Criminal Appeals failed to engage in the legal analysis required by Strickland and instead adopted a rule that defense counsel in a death-penalty case cannot be found ineffective so long as the expert witness he presents "can enlighten a jury more than the average man in the street." Hinton, 2011 WL 3780644, at *6. This analysis conflicts with Strickland and established precedent acknowledging not only that Ake requires "a competent [expert] who will conduct an appropriate examination," 470 U.S. at 83, but also the "special 'need for reliability in the determination that death is the appropriate punishment' in any capital case." Johnson v. Mississippi, 486 U.S. 578, 584 (1988) (quotations omitted); see also Ex parte Monk, 557 So. 2d 832, 836-37 (Ala. 1989) ("death penalty is special circumstance" that

justifies expansion of constitutional rights).

By reducing the performance prong of the Strickland analysis to a question of the bare admissibility of expert testimony, the Court of Criminal Appeals insulates counsel's performance from Sixth Amendment review. The court's decision directly conflicts with the standard established by Strickland and effectively eliminated meaningful Sixth Amendment review of Mr. Hinton's capital murder convictions. The question of what is required from appointed counsel in a criminal case where scientific evidence will be dispositive is a critically important issue and how lower courts review claims of ineffective assistance of counsel is a topic of growing importance. This Court should grant certiorari review.[15]

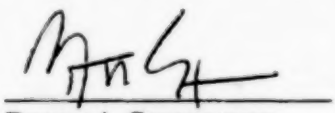
---

[15]According to the Department of Justice, "[o]ur national difficulty to meet the obligations recognized in Gideon is well documented." Statement of Interest of the United States, at 4, Wilbur v. City of Mount Vernon, No. C11-1100RSL (W.D. Wa. Aug. 14, 2013) ("America's indigent defense systems continue to exist in a state of crisis." (quoting Attorney General Eric Holder, Address at the American Film Institute's Screening of Gideon's Army (June 21, 2013), available at http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130621.html)). This Court also has recognized the need to continually reexamine the protections necessary to ensure the right to counsel for indigent defendants. See, e.g., Martinez v. Ryan, 132 S. Ct. 1309, 1317-18 (2012).

CONCLUSION

For the foregoing reasons, Petitioner prays that this Court grant a writ of certiorari to the Alabama Court of Criminal Appeals.

Respectfully submitted,



BRYAN A. STEVENSON
Counsel of Record
CHARLOTTE R. MORRISON
AARYN M. URELL
Equal Justice Initiative
122 Commerce Street
Montgomery, AL 36104
bstevenson@eji.org
(334) 269-1803

Counsel for Petitioner

September 16, 2013

APPENDIX A

--- So.2d ----, 2006 WL 1125605 (Ala.Crim.App.)
(Cite as: 2006 WL 1125605 (Ala.Crim.App.))

Only the Westlaw citation is currently available.

NOT YET RELEASED FOR PUBLICATION.

Court of Criminal Appeals of Alabama.
Anthony Ray HINTON
v.
STATE of Alabama.

CR-04-0940.
April 28, 2006.
Rehearing Denied June 23, 2006.

Background: Following affirmance of his capital murder convictions and death sentence by the Court of Criminal Appeals, 548 So.2d 547, and the Supreme Court, 548 So.2d 562, defendant filed a petition for postconviction relief. The Jefferson Circuit Court, Nos. CC-85-3363.10 and CC-85-3364.10,James S. Garrett, J., denied the petition. Defendant appealed.

Holdings: The Court of Criminal Appeals, Baschab, J., held that:
(1) defendant was not entitled to relief on claims alleging newly discovered evidence;
(2) State's failure to disclose certain ballistics worksheets did not constitute *Brady* violation;
(3) defendant failed to establish that he was denied effective assistance of counsel at trial and on direct appeal;
(4) evidence did not support a jury instruction for the lesser-included offense of felony murder; and
(5) evidence relating to defendant's alibi on night of robbery was properly excluded during evidentiary hearing.

Affirmed.

Wise, J., concurred specially, with opinion.

Cobb and Shaw, JJ., dissented, both with opinion.

West Headnotes

[1] Criminal Law 110 ⇐1030(1)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1030 Necessity of Objections in General
110k1030(1) k. In general. Most Cited Cases

The plain error rule does not apply to postconviction relief proceedings, even if the case involves the death sentence.

[2] Criminal Law 110 ⇐1429(1)

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(A) In General
110k1428 Presentation of Issue in Prior Proceedings
110k1429 In General
110k1429(1) k. In general. Most Cited Cases

The procedural bars of the postconviction relief rule apply with equal force to all cases, including those in which the death penalty has been imposed. Rules Crim.Proc., Rule 32.1 et seq.

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

[3] Criminal Law 110 ⇐938(1)

110 Criminal Law
110XXI Motions for New Trial
110k937 Newly Discovered Evidence
110k938 In General
110k938(1) k. In general. Most Cited Cases

Criminal Law 110 ⇐944

110 Criminal Law
110XXI Motions for New Trial
110k937 Newly Discovered Evidence
110k944 k. Credibility. Most Cited Cases

The granting or denying of a new trial on the basis of newly discovered evidence rests largely in the trial court's discretion; the exercise of that discretion depends largely upon the credibility of the alleged new evidence.

[4] Criminal Law 110 ⇐938(1)

110 Criminal Law
110XXI Motions for New Trial
110k937 Newly Discovered Evidence
110k938 In General
110k938(1) k. In general. Most Cited Cases

Criminal Law 110 ⇐1156(3)

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1156 New Trial
110k1156(3) k. Surprise and newly discovered evidence. Most Cited Cases

The appellate courts look with disfavor on motions for new trial based on newly discovered evidence and the decision of the trial court will not be disturbed absent abuse of discretion.

[5] Criminal Law 110 ⇐944

110 Criminal Law
110XXI Motions for New Trial
110k937 Newly Discovered Evidence
110k944 k. Credibility. Most Cited Cases

One condition of a trial court's granting a new trial on the basis of newly discovered evidence is that the court must believe the evidence presented at the hearing.

[6] Criminal Law 110 ⇐1144.17

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.17 k. Judgment, sentence, and punishment. Most Cited Cases

Since a coram nobis petition serves as a motion for a new trial on the ground of newly discovered evidence, there exists a presumption favoring the correctness of the trial court's ruling on a petition for writ of error coram nobis.

[7] Criminal Law 110 ⇐944

110 Criminal Law
110XXI Motions for New Trial
110k937 Newly Discovered Evidence
110k944 k. Credibility. Most Cited Cases

For purposes of granting or denying of a new trial

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

on the basis of newly discovered evidence, the trial court is in the best position to determine the credibility of the new evidence.

[8] Criminal Law 110 ⚿1536

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(B) Grounds for Relief
110k1536 k. Newly discovered evidence. Most Cited Cases

Capital murder defendant, who alleged in petition for postconviction relief that he was entitled to a new trial based on newly discovered evidence, specifically that newly discovered material facts proved that gun recovered from his mother's home was not the gun used in the murders, was not entitled to relief in this regard; evidence presented at the evidentiary hearing was cumulative to the evidence that was presented at trial and, thus, it would not have changed the outcome of the trial. Rules Crim.Proc., Rules 32.1(e), 32.3.

[9] Criminal Law 110 ⚿1536

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(B) Grounds for Relief
110k1536 k. Newly discovered evidence. Most Cited Cases

A party who files a petition for postconviction relief based on newly discovered evidence cannot go back after the trial to secure what he considers to be a more qualified expert; allowing a party to do so would be contrary to postconviction relief requirement that evidence not be merely cumulative to other facts that were known. Rules Crim.Proc., Rule 32.1(e)(2).

[10] Criminal Law 110 ⚿1536

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(B) Grounds for Relief
110k1536 k. Newly discovered evidence. Most Cited Cases

Capital murder defendant, who alleged in petition for postconviction relief that he was entitled to a new trial based on newly discovered evidence, specifically that newly discovered material facts proved that he was at work in a secure warehouse facility at the time of robbery, was not entitled to relief in this regard; at trial, defendant presented extensive alibi evidence and evidence about how difficult it would have been for him to be at work and to get to robbery location, and therefore, such evidence would have been cumulative to that presented at trial and would have constituted impeachment evidence. Rules Crim.Proc., Rules 32.1(e), 32.3.

[11] Criminal Law 110 ⚿1536

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(B) Grounds for Relief
110k1536 k. Newly discovered evidence. Most Cited Cases

Capital murder defendant, who alleged in petition for postconviction relief that he was entitled to a new trial based on newly discovered evidence, specifically that newly discovered material facts proved that robbery victim's identification was not reliable, was not entitled to relief in this regard; though defendant alleged that victim mistook another individual as the assailant immediately after the robbery, he never presented evidence of victim mistaking individual as the robber, and therefore, the evidence offered at the evidentiary hearing was, at best, impeachment evidence. Rules Crim.Proc., Rules 32.1(e), 32.3.

[12] Criminal Law 110 ⚿1536

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(B) Grounds for Relief
110k1536 k. Newly discovered evidence. Most Cited Cases

Capital murder defendant, who alleged in petition for postconviction relief that he was entitled to a new trial based on newly discovered evidence, specifically that newly discovered material facts proved that the actual perpetrator of the murders was continuing to commit similar crimes after defendant was arrested, was not entitled to relief in this regard; the allegation did not qualify as newly discovered material facts because this evidence was presented at trial and, thus, it would not have changed the outcome of the trial. Rules Crim.Proc., Rules 32.1(e), 32.3.

[13] Criminal Law 110 ⇦1992

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)2 Disclosure of Information
110k1992 k. Materiality and probable effect of information in general. Most Cited Cases
(Formerly 110k700(2.1))

To prove a *Brady* violation, a defendant must show that (1) the prosecution suppressed evidence; (2) the evidence was favorable to the defendant; and (3) the evidence was material to the issues at trial. Rules Crim.Proc., Rule 16.1(c).

[14] Criminal Law 110 ⇦1992

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)2 Disclosure of Information
110k1992 k. Materiality and probable effect of information in general. Most Cited Cases
(Formerly 110k700(2.1))

In the *Brady* context, evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Rules Crim.Proc., Rule 16.1(c).

[15] Criminal Law 110 ⇦2000

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)2 Disclosure of Information
110k1993 Particular Types of Information Subject to Disclosure
110k2000 k. Test results; demonstrative and documentary evidence. Most Cited Cases
(Formerly 110k700(3))

State's failure to disclose to capital murder defendant certain ballistics worksheets containing question marks where the lands and grooves measurements of the recovered bullets should have been indicated did not constitute *Brady* violation; State's ballistics experts being unable to record land and groove measurements from the recovered bullets was not exculpatory evidence because they testified that their ability to determine that there was a match was based upon the microscopic markings left on the unmutilated bearing surfaces of the bullets, and furthermore, defendant failed to establish that the worksheets were favorable to the defense and that they would have been material, or that the outcome of the trial probably would have been different if they had been disclosed to the defense. Rules Crim.Proc., Rule 16.1(c).

[16] Criminal Law 110 ⇦1998

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)2 Disclosure of Information
110k1993 Particular Types of Information Subject to Disclosure
110k1998 k. Statements of witnesses or prospective witnesses. Most Cited Cases
(Formerly 110k700(3))

Capital murder defendant failed to prove that State's alleged failure to disclose statements from two witnesses violated *Brady*; defendant simply made bare allegations that he did not support with facts and evidence. Rules Crim.Proc., Rule 16.1(c).

[17] Criminal Law 110 ⇐1429(2)

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(A) In General
110k1428 Presentation of Issue in Prior Proceedings
110k1429 In General
110k1429(2) k. Post-conviction proceeding not a substitute for appeal. Most Cited Cases

To the extent that capital murder defendant challenged in his postconviction relief petition the statutory limit on attorney fees in capital cases, his argument was procedurally barred because he could have raised it at trial and on appeal, but did not. Rules Crim.Proc., Rule 32.2(a)(3, 5).

[18] Criminal Law 110 ⇐1974

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1974 k. Indigent's or incompetent's counsel and public defenders. Most Cited Cases
(Formerly 110k641.13(7), 110k641.13(2.1))

Capital murder defendant failed to establish that he was denied effective assistance of counsel at trial and on direct appeal due to counsel's allegedly inadequate compensation; defendant made conclusory statements about counsel's performance being impeded, but he did not support his assertions with facts and/or evidence. U.S.C.A. Const.Amend. 6.

[19] Criminal Law 110 ⇐1783

110 Criminal Law
110XXXI Counsel
110XXXI(B) Right of Defendant to Counsel
110XXXI(B)6 Conflict of Interest
110k1782 Particular Cases or Situations
110k1783 k. In general. Most Cited Cases
(Formerly 110k641.5(2.1))

Lack of compensation, per se, is not proof of ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

[20] Criminal Law 110 ⇐1901

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1901 k. Jury selection and composition. Most Cited Cases

Even assuming that defense counsel's apparent ignorance that the cap on expert expenses had been lifted constituted deficient performance, capital murder defendant failed to show that he was prejudiced by that deficient performance, despite his claim that counsel did not present a competent ballistics expert;

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

defense expert testified in detail about his extensive experience with firearms and toolmarks; the identification of striations and lands and grooves; how rifling is created; how bullets travel when shot; his extensive use of comparison microscopes; various ways toolmarks can be obscured or obliterated, including by corrosive primers; his examination of the bullets and revolver in the case; and his conclusion that the bullets had not been fired from the revolver that was recovered from defendant's mother. U.S.C.A. Const.Amend. 6.

[21] Criminal Law 110 ⇐1035(7)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1035 Proceedings at Trial in General
110k1035(7) k. Counsel for accused. Most Cited Cases

To the extent that capital murder defendant's claim on appeal from denial of postconviction relief, that the blame for the limit on funding for an expert was on the trial court rather than on trial counsel, was intended to be a separate ineffective-assistance claim, it was not properly before the Court of Criminal Appeals, since defendant did not first present it to the circuit court. U.S.C.A. Const.Amend. 6.

[22] Criminal Law 110 ⇐1043(3)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1043 Scope and Effect of Objection
110k1043(3) k. Adding to or changing grounds of objection. Most Cited Cases

To the extent that capital murder defendant's claim on appeal from denial of postconviction relief, that the blame for the limit on funding for an expert was on the trial court rather than on trial counsel, was intended to support his claim that trial counsel rendered ineffective assistance because he allegedly did not present a competent ballistics expert, it was not properly before the Court of Criminal Appeals, since it was not consistent with the arguments he presented to the circuit court. U.S.C.A. Const.Amend. 6.

[23] Criminal Law 110 ⇐1035(7)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1035 Proceedings at Trial in General
110k1035(7) k. Counsel for accused. Most Cited Cases

Capital murder defendant's ineffective-assistance-of-counsel claim on appeal from denial of postconviction relief, that counsel should have presented the testimony of two witnesses to undermine the State's time line for the robbery, was not properly before the Court of Criminal Appeals; defendant did not raise the claim in any of his petitions or during the evidentiary hearing. U.S.C.A. Const.Amend. 6.

[24] Criminal Law 110 ⇐1923

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1921 Introduction of and Objec-

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

tions to Evidence at Trial
110k1923 k. Investigating, locating, and interviewing witnesses or others. Most Cited Cases
(Formerly 110k641.13(6))

Capital murder defendant, who asserted that trial counsel failed to establish that robbery witness misidentified him and that law enforcement officers coerced another witness, failed to establish that such conduct constituted ineffective assistance of counsel; though defendant claimed that two other witnesses could have established that he was not the robber, he failed to present evidence about whether or not counsel did investigate these additional witnesses and, rather, made a strategic decision not to present their testimony. U.S.C.A. Const.Amend. 6.

[25] Criminal Law 110 ⇦1930

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1921 Introduction of and Objections to Evidence at Trial
110k1930 k. Identification. Most Cited Cases
(Formerly 110k641.13(6))

Capital murder defendant failed to prove that he was denied effective assistance of counsel, despite allegation that trial counsel did not show that witness's identification of him and of his vehicle was not credible; although defendant made bare allegations, he did not support them with facts and evidence to show that counsel rendered ineffective assistance. U.S.C.A. Const.Amend. 6.

[26] Criminal Law 110 ⇦1922

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1921 Introduction of and Objections to Evidence at Trial
110k1922 k. In general. Most Cited Cases
(Formerly 110k641.13(6))

Capital murder defendant failed to prove that trial counsel was ineffective for failing to present evidence proving that defendant's car had been repossessed and, thus, that he did not own a car matching the description given by robbery victim; at trial, defendant testified that his car had been repossessed on specific date, and therefore, any additional evidence of records proving the car had been repossessed prior to the robbery would have been cumulative. U.S.C.A. Const.Amend. 6.

[27] Criminal Law 110 ⇦1931

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1921 Introduction of and Objections to Evidence at Trial
110k1931 k. Experts; opinion testimony. Most Cited Cases
(Formerly 110k641.13(6))

Capital murder defendant failed to prove that trial counsel was ineffective for failing to obtain expert assistance to establish that defendant could not have driven between his job site and the robbery location in the time required under the State's theory of the case; defendant conceded at postconviction evidentiary hearing that his trial counsel presented "a very, very powerful alibi" at the trial. U.S.C.A. Const.Amend. 6.

[28] Criminal Law 110 ⇦1930

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1921 Introduction of and Objections to Evidence at Trial
110k1930 k. Identification. Most Cited Cases
(Formerly 110k641.13(6))

Capital murder defendant failed to prove that trial counsel was ineffective for allegedly failing to adequately support motion for suppression of the identification of defendant based on an unduly suggestive photo-lineup, the circumstances of robbery victim's identification, and the inconsistencies in victim's description of the suspect's vehicle; defendant failed to allege what additional evidence or arguments that could have been offered in support of the motion to suppress in order to prove that his counsel's performance was deficient. U.S.C.A. Const.Amend. 6.

[29] Criminal Law 110 ⇐1938

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1938 k. Objections to prosecution evidence at trial in general. Most Cited Cases
(Formerly 110k641.13(2.1))

Trial counsel is not ineffective for having an objection overruled or a motion denied. U.S.C.A. Const.Amend. 6.

[30] Criminal Law 110 ⇐1892

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1892 k. Preparation for death penalty matters. Most Cited Cases
(Formerly 110k641.13(6))

Record at trial proved that trial counsel reasonably investigated lead regarding a caller claiming responsibility for crimes for which capital murder defendant was convicted and, thus, trial counsel was not ineffective; counsel presented the testimony of his office manager, who testified out of the presence of the jury that she received a phone call at the office regarding the murders, and trial counsel subsequently explained to the trial court how he had tried to follow up on this phone call and he told the court about a similar call he received at home. U.S.C.A. Const.Amend. 6.

[31] Criminal Law 110 ⇐1901

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1901 k. Jury selection and composition. Most Cited Cases
(Formerly 110k641.13(2.1))

Because capital murder defendant failed to allege or prove disparate treatment in the State's use of its peremptory challenges, he was unable to prove that his trial counsel was ineffective for not making a *Batson* motion; defendant presented absolutely no evidence of the veniremembers' race, disparate treatment, or of how the State used its peremptory strikes. U.S.C.A. Const.Amend. 6.

[32] Criminal Law 110 ⇐1901

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

110XXXI(C)2 Particular Cases and Issues
110k1901 k. Jury selection and composition. Most Cited Cases
(Formerly 110k641.13(2.1))

To prevail on a claim of ineffective assistance of counsel based upon an attorney's failure to make a *Batson* motion, a defendant must show that there was a prima facie case of purposeful discrimination by the State in the jury selection process. U.S.C.A. Const.Amend. 6.

[33] Criminal Law 110 ⇨1901

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1901 k. Jury selection and composition. Most Cited Cases
(Formerly 110k641.13(2.1))

If the record does not show a prima facie case of purposeful discrimination by the State in the jury selection process, then an appellate court will not assume that a defendant's attorney was ineffective in not making a *Batson* motion. U.S.C.A. Const.Amend. 6.

[34] Criminal Law 110 ⇨1119(1)

110 Criminal Law
110XXIV Review
110XXIV(G) Record and Proceedings Not in Record
110XXIV(G)15 Questions Presented for Review
110k1113 Questions Presented for Review
110k1119 Conduct of Trial in General
110k1119(1) k. In general. Most Cited Cases

Where a prima facie case of purposeful discrimination by the State in the jury selection process may have existed, but the record did not reflect it because counsel did not record the race and gender of the veniremembers, a defendant claiming ineffective assistance of counsel based upon an attorney's failure to make a *Batson* motion still bears the burden of presenting evidence to prove the prima facie case because error cannot be predicated on a silent record. U.S.C.A. Const.Amend. 6.

[35] Jury 230 ⇨33(5.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory challenges. Most Cited Cases

A *Batson* motion based solely on the number of African–Americans removed from the venire will not prove a prima facie case of discrimination.

[36] Criminal Law 110 ⇨1901

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1901 k. Jury selection and composition. Most Cited Cases
(Formerly 110k641.13(2.1))

Capital murder defendant failed to prove that trial counsel was ineffective for failing to have portions of the jury selection and bench conferences transcribed; defendant only made speculative allegations as to how he may have been prejudiced without offering any evidence as to how he was actually prejudiced.

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

U.S.C.A. Const.Amend. 6.

[37] Homicide 203 ⚿1456

203 Homicide
203XII Instructions
203XII(C) Necessity of Instruction on Other Grade, Degree, or Classification of Offense
203k1456 k. Degree or classification of homicide. Most Cited Cases

Evidence in prosecution for capital murder did not support a jury instruction on the lesser-included offense of felony murder; there was no evidence that the murders were anything but intentional.

[38] Criminal Law 110 ⚿795(1)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k795 Grade or Degree of Offense; Included Offenses
110k795(1) k. In general. Most Cited Cases

Criminal Law 110 ⚿814(20)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k814 Application of Instructions to Case
110k814(20) k. Grade or degree of offense. Most Cited Cases

Defendants are entitled to jury instructions on lesser-included offenses; however, defendants are not entitled to jury instructions on lesser-included offenses where there is no evidence to support such a charge.

[39] Criminal Law 110 ⚿1944

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1944 k. Objections to argument or conduct of counsel. Most Cited Cases
(Formerly 110k641.13(2.1))

Capital murder defendant failed to prove that trial counsel was ineffective for failing to object to numerous instances of improper conduct by the prosecutor; while defendant pointed to certain statements made during trial and nothing more, he failed to prove that the outcome of the trial would have been different without those statements. U.S.C.A. Const.Amend. 6.

[40] Criminal Law 110 ⚿1901

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1901 k. Jury selection and composition. Most Cited Cases
(Formerly 110k641.13(2.1))

Capital murder defendant failed to prove that trial counsel was ineffective for allegedly failing to adequately examine jurors to determine those who would automatically sentence him to death if he were convicted of capital murder; trial court conducted voir dire and asked the veniremembers if any of them had fixed opinions regarding the imposition of the death penalty, two veniremembers were removed for cause because they could not vote for the death penalty under any circumstances, another veniremember was removed for cause because he would only vote for the death penalty if defendant were convicted of capital

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

murder, and the remaining veniremembers indicated that they would not automatically vote for the death penalty if defendant were convicted of capital murder. U.S.C.A. Const.Amend. 6.

[41] Criminal Law 110 ⇦1961

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1958 Death Penalty
110k1961 k. Presentation of evidence in sentencing phase. Most Cited Cases
(Formerly 110k641.13(7))

Capital murder defendant failed to prove that trial counsel was ineffective for allegedly failing to call any witnesses besides defendant in mitigation during the penalty phase; defendant did not allege who trial counsel could have called or to what those witnesses would have testified, and he presented no evidence of witnesses who could have testified for mitigation purposes at his trial. U.S.C.A. Const.Amend. 6.

[42] Criminal Law 110 ⇦1960

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1958 Death Penalty
110k1960 k. Adequacy of investigation of mitigating circumstances. Most Cited Cases
(Formerly 110k641.13(7))

Capital murder defendant failed to prove that trial counsel was ineffective during penalty phase for allegedly failing to obtain complete and accurate information regarding defendant's family and social history, educational history, medical history, mental health history, correctional history, and any community and cultural influences; defendant did not allege what specific records trial counsel could have presented or what those documents would have testified in mitigation. U.S.C.A. Const.Amend. 6.

[43] Criminal Law 110 ⇦1961

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1958 Death Penalty
110k1961 k. Presentation of evidence in sentencing phase. Most Cited Cases
(Formerly 110k641.13(7))

Capital murder defendant failed to prove that trial counsel was ineffective for allegedly failing to consult or communicate with him before his testimony in the penalty phase; defendant did not allege how counsel's performance was deficient by allowing him to speak freely to the trial court about his sentence and he did not specifically allege how he was prejudiced. U.S.C.A. Const.Amend. 6.

[44] Criminal Law 110 ⇦1961

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1958 Death Penalty
110k1961 k. Presentation of evidence in sentencing phase. Most Cited Cases
(Formerly 110k641.13(7))

Capital murder defendant failed to prove that trial counsel was ineffective for failing to object to the State presenting testimony at the sentencing hearing from two bailiffs about defendant saying that he knew how to beat a polygraph; the two bailiffs testified before the judge only after the penalty phase at the

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

sentencing hearing, and therefore, it was not possible for this testimony to have influenced the jury's recommendation in any way because the jury had already rendered its sentencing recommendation and the jury had been released. U.S.C.A. Const.Amend. 6.

[45] Criminal Law 110 ⚿1890

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1890 k. In general. Most Cited Cases
(Formerly 110k641.13(2.1))

Trial counsel can not be deficient for failing to object to something that is established by statute. U.S.C.A. Const.Amend. 6.

[46] Criminal Law 110 ⚿1967

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1966 Appeal
110k1967 k. In general. Most Cited Cases
(Formerly 110k641.13(7))

Capital murder defendant failed to prove that counsel was ineffective on appeal for not consulting with defendant prior to filing appeal; defendant did not allege how counsel's performance was deficient or how he was prejudiced. U.S.C.A. Const.Amend. 6.

[47] Criminal Law 110 ⚿1967

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1966 Appeal
110k1967 k. In general. Most Cited Cases
(Formerly 110k641.13(7))

To prove that counsel was ineffective on appeal, a defendant must prove that the outcome of his appeal would have been different but for counsel's deficient performance. U.S.C.A. Const.Amend. 6.

[48] Criminal Law 110 ⚿1901

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1901 k. Jury selection and composition. Most Cited Cases
(Formerly 110k641.13(2.1))

Capital murder defendant failed to prove that counsel was ineffective on appeal for not raising an alleged *Batson* violation; defendant did not allege the facts necessary to prove a prima facie case of purposeful discrimination by the State in the jury selection process. U.S.C.A. Const.Amend. 6.

[49] Criminal Law 110 ⚿1970

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1966 Appeal
110k1970 k. Procedure in general; timeliness. Most Cited Cases
(Formerly 110k641.13(7))

Capital murder defendant failed to prove that trial counsel was ineffective for failing to supplement the

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

record on appeal to note the racial composition of the jury or the race and gender of those removed through peremptory challenges, since he did not present facts necessary to prove a prima facie case for a *Batson* motion. U.S.C.A. Const.Amend. 6.

[50] Criminal Law 110 ⇐1901

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1901 k. Jury selection and composition. Most Cited Cases
(Formerly 110k641.13(2.1))

Failure to make a record of the race or gender of persons against whom the prosecution asserted peremptory strikes is not per se ineffective assistance of counsel; it would constitute ineffective assistance only if a prima facie case of purposeful discrimination existed. U.S.C.A. Const.Amend. 6.

[51] Criminal Law 110 ⇐1035(7)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1035 Proceedings at Trial in General
110k1035(7) k. Counsel for accused. Most Cited Cases

Capital murder defendant's claim on appeal from denial of his postconviction relief petition, that counsel rendered ineffective assistance on direct appeal because he did not challenge the denial of funds necessary to protect defendant's rights, was not properly before the Court of Criminal Appeals, since defendant did not first present it to the circuit court. U.S.C.A. Const.Amend. 6.

[52] Criminal Law 110 ⇐1134.60

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)5 Theory and Grounds of Decision in Lower Court
110k1134.60 k. In general. Most Cited Cases
(Formerly 110k1134(6))

Court of Criminal Appeals may affirm a circuit court's denial of a petition for postconviction relief if it is correct for any reason.

[53] Criminal Law 110 ⇐1429(2)

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(A) In General
110k1428 Presentation of Issue in Prior Proceedings
110k1429 In General
110k1429(2) k. Post-conviction proceeding not a substitute for appeal. Most Cited Cases

Capital murder defendant's claim on appeal from denial of his petition for postconviction relief, alleging that the State lost or destroyed exculpatory evidence regarding robbery victim's identification of defendant, was precluded from postconviction relief, where claim could have been, but was not, raised in a pretrial motion or at trial or on direct appeal. Rules Crim.Proc., Rule 32.2(a)(3, 5).

[54] Criminal Law 110 ⇐1536

110 Criminal Law
110XXX Post-Conviction Relief

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

110XXX(B) Grounds for Relief
110k1536 k. Newly discovered evidence. Most Cited Cases

Where postconviction-relief claims raised under *Brady* are not based upon newly discovered evidence, the procedural bars of postconviction-relief rule apply. Rules Crim.Proc., Rule 32.2(a).

[55] Criminal Law 110 ⇐1429(2)

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(A) In General
110k1428 Presentation of Issue in Prior Proceedings
110k1429 In General
110k1429(2) k. Post-conviction proceeding not a substitute for appeal. Most Cited Cases

Capital murder defendant's claim on appeal from denial of his petition for postconviction relief, alleging that the State destroyed possible exculpatory evidence by returning the car to robbery victim without testing the car for fingerprints, was precluded from postconviction relief, where claim could have been, but was not, raised in a pretrial motion or at trial or on direct appeal. Rules Crim.Proc., Rule 32.2(a)(3, 5).

[56] Criminal Law 110 ⇐1158.1

110 Criminal Law
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158.1 k. In general. Most Cited Cases
(Formerly 110k1158(1))

While the practice of adopting the State's proposed findings of fact and conclusions of law is subject to criticism, the general rule is that even when the court adopts proposed findings and conclusions verbatim, the findings are those of the court and may be reversed only if clearly erroneous.

[57] Criminal Law 110 ⇐1429(2)

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(A) In General
110k1428 Presentation of Issue in Prior Proceedings
110k1429 In General
110k1429(2) k. Post-conviction proceeding not a substitute for appeal. Most Cited Cases

Capital murder defendant's claim on appeal from denial of his petition for postconviction relief, alleging that the failure to provide the defense with competent expert assistance entitled him to relief, was precluded from postconviction relief, where defendant could have raised the claim at trial and on direct appeal, but did not. Rules Crim.Proc., Rule 32.2(a)(3, 5).

[58] Criminal Law 110 ⇐1614

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)2 Affidavits and Evidence
110k1614 k. Admissibility. Most Cited Cases

Evidence relating to capital murder defendant's alibi on the night of robbery was properly excluded during evidentiary hearing on defendant's petition for postconviction relief, since the alibi evidence would simply have been cumulative to evidence presented at trial. Rules Crim.Proc., Rule 32.1(e)(2).

[59] Criminal Law 110 ⇐1559

110 Criminal Law
110XXX Post-Conviction Relief

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

110XXX(B) Grounds for Relief
110k1559 k. Appeal. Most Cited Cases
(Formerly 110k1134(3))

Capital murder defendant's claim on appeal from denial of his petition for postconviction relief, alleging that the trial court erred when it consolidated two separate capital murder indictments for trial, was precluded from review, where it was raised and addressed at trial and on direct appeal. Rules Crim.Proc., Rule 32.2(a)(2, 4).

[60] Criminal Law 110 ⇐1559

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(B) Grounds for Relief
110k1559 k. Appeal. Most Cited Cases
(Formerly 110k1134(3))

Capital murder defendant's claim on appeal from denial of his petition for postconviction relief, alleging that the trial court erred when it excluded polygraph evidence that would have exonerated him, was precluded from review, where it was raised and addressed at trial and on direct appeal. Rules Crim.Proc., Rule 32.2(a)(2, 4).

[61] Criminal Law 110 ⇐1559

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(B) Grounds for Relief
110k1559 k. Appeal. Most Cited Cases
(Formerly 110k1134(3))

Capital murder defendant's claim on appeal from denial of his petition for postconviction relief, alleging that the State's loss of test bullets required a new trial, was precluded from review, where it was raised and addressed on direct appeal. Rules Crim.Proc., Rule 32.2(a)(4).

[62] Criminal Law 110 ⇐1559

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(B) Grounds for Relief
110k1559 k. Appeal. Most Cited Cases
(Formerly 110k1134(3))

Capital murder defendant's claim on appeal from denial of his petition for postconviction relief, alleging that the trial court improperly allowed the State's experts to testify based on evidence—test bullets—that was not admitted at trial, was precluded from review, where it was raised and addressed on direct appeal. Rules Crim.Proc., Rule 32.2(a)(4).

[63] Courts 106 ⇐100(1)

106 Courts
106II Establishment, Organization, and Procedure
106II(H) Effect of Reversal or Overruling
106k100 In General
106k100(1) k. In general; retroactive or prospective operation. Most Cited Cases

Decision in *Ring*, which held in part that capital defendants are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment, does not apply retroactively to cases pending on collateral review.

[64] Criminal Law 110 ⇐1043(3)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1043 Scope and Effect of Objection
110k1043(3) k. Adding to or chang-

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

ing grounds of objection. Most Cited Cases

Capital murder defendant's claim on appeal from denial of his petition for postconviction relief, alleging that lethal injection results in the unnecessary and gratuitous infliction of pain in violation of the Eighth Amendment, was not properly before the Court of Criminal Appeals, where defendant raised the claim for the first time on appeal; in the circuit court, defendant challenged execution by electrocution. U.S.C.A. Const.Amend. 8.

J. Drew Colfax and Bryan A. Stevenson, Montgomery, for appellant.

Troy King, atty. gen., and Corey L. Maze, asst. atty. gen., for appellee.

BASCHAB, Judge.

***1** On September 17, 1986, the appellant was convicted of two counts of capital murder for the killings of John Davidson and Thomas Wayne Vason. The murders were made capital because he committed them during the course of a robbery. *See* § 13A-5-40(a)(2), Ala.Code 1975. By a vote of 10-2, the jury recommended that he be sentenced to death. On December 15, 1986, the trial court accepted the jury's recommendation and sentenced him to death. We affirmed his convictions and sentences, *see Hinton v. State*, 548 So.2d 547 (Ala.Crim.App.1988); the Alabama Supreme Court affirmed his convictions and sentences, *see Ex parte Hinton*, 548 So.2d 562 (Ala.1989); and the United States Supreme Court denied his petition for certiorari review, *see Hinton v. Alabama*, 493 U.S. 969, 110 S.Ct. 419, 107 L.Ed.2d 383 (1989). This court issued a certificate of judgment on July 6, 1989.

On August 15, 1990, the appellant filed a Rule 32 petition, challenging his conviction and sentence, which he subsequently amended. After the State responded, the circuit court conducted an evidentiary hearing and denied the petition. This appeal followed.

[1][2] The appellant raises several arguments, including claims that his attorneys rendered ineffective assistance during the proceedings. In reviewing the circuit court's rulings on the appellant's arguments, we apply the following principles:

" ' "[T]he plain error rule does not apply to Rule 32 proceedings, even if the case involves the death sentence." *Thompson v. State*, 615 So.2d 129 (Ala.Cr.App.1992).' *Cade v. State*, 629 So.2d 38, 41 (Ala.Crim.App.1993), cert. denied, [511] U.S. [1046], 114 S.Ct. 1579, 128 L.Ed.2d 221 (1994).

"In addition, '[t]he procedural bars of Rule 32 apply with equal force to all cases, including those in which the death penalty has been imposed.' *State v. Tarver*, 629 So.2d 14, 19 (Ala.Crim.App.1993)."

Brownlee v. State, 666 So.2d 91, 93 (Ala.Crim.App.1995).

"To prevail on a claim of ineffective assistance of counsel, the defendant must show (1) that his counsel's performance was deficient and (2) that he was prejudiced as a result of the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

" 'The appellant must show that his counsel's performance was unreasonable, considering all of the attendant circumstances.... "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066.'

" *Duren v. State*, 590 So.2d 360, 362 (Ala.Cr.App.1990), aff'd, 590 So.2d 369 (Ala.1991), cert. denied, [503] U.S. [974], 112 S.Ct. 1594, 118 L.Ed.2d 310 (1992).

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

"When this court is reviewing a claim of ineffective assistance of counsel, we indulge a strong presumption that counsel's conduct was appropriate and reasonable. *Luke v. State*, 484 So.2d 531, 534 (Ala.Cr.App.1985). The burden is on the appellant to show that his counsel's conduct was deficient. *Luke*.

***2** " 'Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.'

" *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065–66. (Citations omitted.) *Ex parte Lawley*, 512 So.2d 1370, 1372 (Ala.1987).

"Initially we must determine whether counsel's performance was deficient. We must evaluate whether the action or inaction of counsel of which the petitioner complains was a strategic choice. 'Strategic choices made after a thorough investigation of relevant law and facts are virtually unchallengeable....' *Lawley*, 512 So.2d at 1372. This court must avoid using 'hindsight' to evaluate the performance of counsel. We must evaluate all the circumstances surrounding the case at the time of counsel's actions before determining whether counsel rendered ineffective assistance. *Folkner v. State*, 586 So.2d 39 (Ala.Cr.App.1991)."

Hallford v. State, 629 So.2d 6, 8–9 (Ala.Crim.App.1992).

"In determining whether a defendant has established his burden of showing that his counsel was ineffective, we are not required to address both considerations of the *Strickland v. Washington* test if the defendant makes an insufficient showing on one of the prongs. *Id.* at 697, 104 S.Ct. at 2069. In fact, the Court explained that '[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.' *Id.* We defer to this guidance and address the 'prejudice' prong, for '[w]ith respect to the prejudice component, the lack of merit of [Thomas's] claim is even more stark.' *Id.* at 699, 104 S.Ct. at 2070."

Thomas v. State, 511 So.2d 248, 255 (Ala.Crim.App.1987) (footnote omitted).

"Furthermore, to render effective assistance, an attorney is not required to raise every conceivable constitutional claim available at trial and on appeal. *Holladay v. State*, 629 So.2d 673 (Ala.Cr.App.1992), cert. denied, 510 U.S. 1171, 114 S.Ct. 1208, 127 L.Ed.2d 555 (1994); *McCoy v. Lynaugh*, 874 F.2d 954, 965–66 (5th Cir.1989). Rather, counsel must be given some discretion in determining which claims possibly have merit, and thus a better chance of success, and which claims do not have merit, and thus have little chance of success. *Heath v. State*, 536 So.2d 142 (Ala.Cr.App.1988); *Smith v. Murray*, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986); *Engle v.*

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982)."

**3 *Davis v. State*, 720 So.2d 1006, 1014 (Ala.Crim.App.1998). Finally,

"[t]he purpose of ineffectiveness review is not to grade counsel's performance. *See Strickland [v. Washington]*, [466 U.S. 668,] 104 S.Ct. [2052] at 2065 [(1984)]; *see also White v. Singletary*, 972 F.2d 1218, 1221 (11th Cir.1992)('We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.'). We recognize that '[r]epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.' *Strickland*, 104 S.Ct. at 2067. Different lawyers have different gifts; this fact, as well as differing circumstances from case to case, means the range of what might be a reasonable approach at trial must be broad. To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. But, the issue is not what is possible or 'what is prudent or appropriate, but only what is constitutionally compelled.' *Burger v. Kemp*, 483 U.S. 776, 107 S.Ct. 3114, 3126, 97 L.Ed.2d 638 (1987)."

Chandler v. United States, 218 F.3d 1305, 1313 (11th Cir.2000) (footnote omitted).

The following facts, as set forth in this court's opinion on direct appeal, are helpful to an understanding of this case:

"The two robbery-homicides which are the basis for the charges, which were brought under separate indictments, occurred on separate dates. The first robbery-homicide occurred on February 23, 1985, at Mrs. Winner's fried chicken restaurant, located at 737 29th Street, South, in Birmingham. This restaurant is approximately two and one-half blocks from the Red Mountain Expressway. Shortly after midnight on the morning of February 24, 1985, Thomas Elliott, an exterminator, arrived at Mrs. Winner's. Finding the door unlocked, Mr. Elliott entered the restaurant and called out. Mr. Elliott saw a light on in the back of the restaurant and headed toward it. Next to the cooler he found John Davidson, the restaurant's assistant manager, lying in a pool of blood. Mr. Davidson had been shot and was bleeding very badly. Mr. Davidson's false teeth were on the floor of the cooler. Blood was all over the door of the cooler. Mr. Elliott immediately called the 911 emergency number and summoned the Birmingham Police Department, as well as the rescue facilities of the Birmingham Fire Department, to the restaurant.

"After assistance had been summoned, Mr. Davidson got up and started walking around the restaurant, but was unresponsive to Mr. Elliott's presence. Because he was frightened, Mr. Elliott went outside the restaurant to await the arrival of the paramedics. Moments later, the police and paramedics arrived, almost simultaneously. The paramedics administered emergency treatment to Mr. Davidson, then transported him to Medical Center East Hospital.

"While the paramedics were attending Mr. Davidson, the police began their investigation of the incident. In the course of their investigation, the police determined that there was no sign of forced entry into the restaurant. However, the top of the safe was off and the safe was empty. A review of the restaurant's business records revealed that $2,100 was missing from the safe. No fingerprints were found at the scene. Mr. Davidson's truck was parked outside the restaurant and his wallet was on the front seat of the truck. Based on their investigation, the police concluded that Mr. Davidson, who had been alone in the restaurant, was accosted by an unknown gunman as he left the restaurant, forced to re-enter the restaurant, open the safe, and give the armed

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

robber the cash contents of the restaurant's safe, and was then directed into the restaurant's cooler and shot twice in the head by the unknown robber.

***4** "Meanwhile, the victim, Mr. Davidson, was undergoing extensive surgery at Medical Center East, but to no avail; he died on February 25, 1985. During the course of the surgery, a .38 caliber bullet was removed from Mr. Davidson's head. This projectile was subsequently turned over to the Alabama Department of Forensic Sciences for its examination. Dr. Robert Brissie, chief coroner of Jefferson County, performed the autopsy on the victim. His examination revealed that Mr. Davidson suffered two gunshot wounds to the head. One bullet penetrated beneath his right eye and the other bullet entered approximately seven inches from the top of his head. Both wounds were to the right side of Mr. Davidson's face. It was Dr. Brissie's opinion that Mr. Davidson died as a result of gunshot wounds to his head. During the course of the autopsy, the second bullet was removed from the victim's head and turned over to the Department of Forensic Sciences for examination.

"The second robbery-homicide occurred on July 1, 1985, at the Captain D's restaurant in Woodlawn, in the eastern section of Birmingham. This restaurant is located two to two and one-half blocks from the interchange of Interstate Highways 20 and 59. Earnest Horn left his job at Captain D's on the night of July 1, 1985, around 11:30 p.m., leaving the assistant manager, Thomas Wayne Vason, alone in the restaurant counting the money taken in that day and preparing to call in his report of the day's sales to the Shoney's regional office. (Captain D's restaurants are a subsidiary of the Shoney's restaurant chain.) When Mr. Horn left the restaurant the alarm system was plugged into the phone. At approximately 12:45 a.m. on July 2, 1985, Mr. Vason called in his sales total to the regional office, then left the restaurant.

"At 7:45 a.m. on July 2, 1985, Reuben Valdez, manager of the Captain D's in Woodlawn, arrived at the restaurant in preparation for the day's opening. He noticed Mr. Vason's car, but at the time thought nothing of it. Mr. Valdez entered the restaurant and saw that the safe was open. He then saw Mr. Vason's body lying in the cooler. Mr. Vason had been shot and appeared dead to Mr. Valdez. The police were immediately summoned. Mr. Valdez then called the area supervisor of Shoney's to report the crimes. Birmingham police officers first arrived at approximately 7:50 a.m. Additional investigators arrived shortly thereafter. Police found on the floor next to the open safe a piece of paper on which was written the combination to the safe. Mr. Vason's wallet was also found nearby on the desk; it contained $165 in bills of various denominations. A review of the business records revealed that $650 was missing from the safe. Additionally, the telephone alarm system was unplugged. There was, again, no sign of forced entry into the restaurant. The side kitchen door to the restaurant, the one nearest to the safe (on which a smudged fingerprint was found), could be opened only from the inside or the outside with a key. Mr. Vason's keys were found in the kitchen area. Based on their investigation, the police concluded that Mr. Vason, upon leaving the restaurant, was accosted by an unknown gunman and forced to re-enter the restaurant, open the safe, and give the armed robber the cash contents of the restaurant's safe, and then was directed into the restaurant's cooler and fatally shot twice in the head by the unknown robber.

***5** "Dr. Pat Garceau, a medical examiner in the Jefferson County Coroner's Office, determined that Mr. Vason was dead at the scene of the crime. Dr. Garceau's autopsy of the victim revealed that Mr. Vason had suffered two gunshot wounds to the head. One gunshot wound entered the right cheek of Mr. Vason, and the other entered one and one-half inches from the top of his head. Further testing performed on the victim by Dr. Garceau determined

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

the time of death to be between 12:30 a.m. and 2:30 a.m. on July 2, 1985. It was Dr. Garceau's opinion that Mr. Vason's death was the result of a gunshot wound which penetrated his brain.

"During the course of the autopsy, two .38 caliber bullets were recovered from the body of Mr. Vason. Both bullets were turned over to the Department of Forensic Sciences for its examination. The .38 caliber bullets which were recovered from the bodies of Mr. Davidson and Mr. Vason were later examined by firearms experts in the Department of Forensic Sciences to determine if they had been fired from the same weapon. Examination by these experts revealed that the bullets taken from the head of Mr. Davidson and the bullets recovered from the head of Mr. Vason were fired from the same weapon. Further similarities were present, in that both victims had been shot twice in the head, and both victims, at some time during the course of the robbery, were placed in the walk-in cooler of the restaurant. Moreover, during the investigation of both robberies, fingerprint technicians examined areas of the restaurant and were unable to find any latent fingerprints which could lead to the arrest of a suspect. Thus, without any further leads, the police department's investigation was at a standstill.

"Later in the month of July, however, Birmingham police investigators working on these cases got their first big break. On July 25, 1985, Sidney Smotherman, who was a night manager of Quincy's Family Steak House restaurant in Bessemer, survived a robbery which fit the pattern of the Mrs. Winner's and Captain D's robbery-homicides. Mr. Smotherman told Bessemer police he was working the night shift at Quincy's in Bessemer on July 24, 1985. Quincy's is located approximately four to five blocks from Interstate 59. Upon closing, however, several employees who were on the clean-up detail that night exited the building at the same time as Mr. Smotherman, approximately 12:14 a.m. on July 25, 1985. Mr. Smotherman got into his 1985 silver Pontiac Fiero and drove to the nearby Food World. Two other employees of Quincy's also stopped by Food World after work to pick up some items before going home for the night. One of the employees noticed a 'strange looking guy' inside the store. The man seemed strange because he was not shopping and kept putting his hand up to his face in an apparent attempt to hide his face. This strange man did not make a purchase, but instead followed Mr. Smotherman outside the store. The receipt from Mr. Smotherman's purchases showed that Mr. Smotherman exited Food World at 12:26 a.m. on July 25, 1985.

*6 "After leaving Food World, Mr. Smotherman got into his car and began driving home. He had gone less than a mile down the road, when his car was bumped from the rear while he was stopped at a traffic light. Mr. Smotherman and the other driver, whom he identified as the defendant, got out of their cars to survey the damage. Having satisfied himself that there w[a]s no damage to his car, Mr. Smotherman got back into his car and prepared to drive off, but was prevented from doing so when the other man pulled a gun on him. The gunman ordered Mr. Smotherman to get into the front seat of the gunman's car, a large, dark-colored, mid–70's model. After parking Mr. Smotherman's car, the gunman walked back to his car carrying the gun and a white shirt or towel in his hand. He told Mr. Smotherman that he had been waiting for him and that he had to be in Atlanta in three hours.

"The gunman then drove to Quincy's, pointed his gun at Mr. Smotherman, and told him they were going inside. Mr. Smotherman was ordered to get the gunman everything out of the safe except the pennies. After he had all the money, the gunman asked Mr. Smotherman where the cooler was located. Mr. Smotherman was then instructed to enter the cooler. Remembering from news accounts of the Mrs. Winner's and Captain D's robbery-homicides that the managers had been killed inside the coolers,

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

--- So.2d ----, 2006 WL 1125605 (Ala.Crim.App.)
(Cite as: 2006 WL 1125605 (Ala.Crim.App.))

Mr. Smotherman realized that this could be the same person and very likely he was going to be killed. He requested that the gunman put him in the storage room where the canned goods and vegetables were kept, as it was not as cold in that room. The gunman agreed to Mr. Smotherman's request and ordered him into the storeroom. As Mr. Smotherman walked into the room, he turned and saw the gunman pointing a pistol at his head. He ducked and threw his hands up just as two shots were being fired. As he was falling, he kicked the door shut, and as it closed it locked automatically, thus preventing the robber from coming into the room. One of the bullets hit Mr. Smotherman in the finger and then grazed his head. After waiting about ten minutes, Mr. Smotherman left the storeroom, went next door to the Motel 6, and called the police. Mr. Smotherman was taken to the hospital for treatment. While medical personnel were examining and treating Mr. Smotherman's injuries, they discovered that one of the bullets fired at him by the robber had ricocheted off of something and fallen into his shirt pocket. This bullet, along with the bullet recovered from the storeroom, was turned over to the Department of Forensic Sciences for its examination. Upon examination, it was determined by the forensic experts that these two bullets were fired from the same weapon that had fired the bullets which caused the deaths of John Davidson and Thomas Wayne Vason.

"Police investigators could not lift any fingerprints from Mr. Smotherman's car or from inside the restaurant. Mr. Smotherman was, however, able to provide police with a detailed description of the robber and assisted in constructing a composite drawing of the suspect. On July 30, 1985, Mr. Smotherman was shown a photographic array, and within a few seconds he picked up the defendant's photograph and stated, 'This is him.' At trial Mr. Smotherman identified the defendant as the gunman who robbed and then shot him. Mr. Smotherman's co-worker also identified the defendant Anthony Ray Hinton as the 'strange' man he had seen in Food World just minutes before the robbery/shooting.

*7 "Police investigators also discovered that approximately two weeks before the Quincy's robbery, the defendant had approached Reginald White, an employee of Quincy's in Bessemer, in Hoover at the location of his second job. Mr. White had not seen the defendant in some four years. At the time they had last seen each other, the defendant was a frequent patron of Quincy's. The defendant asked Mr. White if he was still working at Quincy's. Mr. White replied, 'yes.' The defendant also asked if 'Mr. Don' was the manager. Mr. White replied no, that the Quincy's in Bessemer had a new manager who had just bought a new Fiero. The defendant also inquired as to what time the restaurant closed.

"On July 31, 1985, Sergeant Clyde Amberson of the Jefferson County Sheriff's Department went to the defendant's home in Walker [C]ounty. Sergeant Amberson was accompanied by an investigator from the Walker County District Attorney's Office. The defendant was informed that they had a warrant for his arrest, placed him under arrest on a robbery charge, and informed him of his *Miranda* rights. The defendant gave permission for his car and his bedroom to be searched. No incriminating evidence was found in either place. Sergeant Amberson asked defendant's mother if she had a gun in the house. She answered affirmatively. However, when she opened the kitchen drawer to get the gun, it was gone. She then went into the back bedroom and returned with a pistol. Mrs. Hinton gave the officers the gun and two bullets taken from the gun.

"The gun given to the police investigators by the defendant's mother, a .38 caliber Smith & Wesson pistol, was turned over to the State Department of Forensic Sciences for its examination. As has been previously stated, two bullets were fired at each of the three victims involved in the aforementioned

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

robberies. Each of these bullets was recovered and turned over to the Department of Forensic Sciences for examination. Expert examination of these bullets established that all six of the bullets were fired through the same weapon. The gun recovered at the defendant's home was test-fired by these same forensic experts and it was determined that this was the weapon through which all of the bullets recovered from these three robbery investigations were fired. The defendant was then arrested and charged with capital murder in the deaths of John Davidson and Thomas Wayne Vason.

"The defendant maintained that at the time of the Quincy's robbery he was at his job at the Bruno's warehouse in Ensley, and at trial he presented testimony to that effect. Further testimony was presented by the defendant himself, who denied any involvement with any of the three incidents. The defense also called expert witness Andrew Payne, a consulting engineer with some expertise in firearms identification. Mr. Payne stated that he examined each of the bullets recovered from the three incidents and the weapon recovered from the defendant's home. It was his conclusion that no determination could be made that the bullets had been fired from that weapon."

***8** *Hinton*, 548 So.2d at 550–53.

I.

[3][4][5][6][7] The appellant's first argument is that he is factually innocent. With regard to newly discovered evidence, Rule 32.1, Ala. R.Crim. P., provides, in pertinent part:

"Subject to the limitations of Rule 32.2, any defendant who has been convicted of a criminal offense may institute a proceeding in the court of original conviction to secure appropriate relief on the ground that:

"....

"(e) Newly discovered material facts exist which require that the conviction or sentence be vacated by the court, because:

"(1) The facts relied upon were not known by the petitioner or the petitioner's counsel at the time of trial or sentencing or in time to file a posttrial motion pursuant to Rule 24, or in time to be included in any previous collateral proceeding and could not have been discovered by any of those times through the exercise of reasonable diligence;

"(2) The facts are not merely cumulative to other facts that were known;

"(3) The facts do not merely amount to impeachment evidence;

"(4) If the facts had been known at the time of trial or of sentencing, the result probably would have been different; and

"(5) The facts establish that the petitioner is innocent of the crime for which the petitioner was convicted or should not have received the sentence that the petitioner received."

Rule 32.1, Ala. R.Crim. P.

"It is well-settled under Alabama law that '[t]he granting or denying of a new trial on the basis of newly discovered evidence rests largely in the trial court's discretion. *Welch [v. Jones*, 470 So.2d 1103 (Ala.1985)]. The exercise of that discretion depends largely upon the credibility of the alleged new evidence. *McDonald v. State*, 451 So.2d 440 (Ala.Crim.App.1984).' *Hamm v. Hudson Industries, Inc.*, 507 So.2d 933, 935 (Ala.Civ.App.1986), rev'd, *Ex parte Hamm*, 507 So.2d 936 (Ala.1987). 'The appellate courts look with disfavor on motions

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

for new trial based on newly discovered evidence and the decision of the trial court will not be disturbed absent abuse of discretion.' *Sexton v. State*, 529 So.2d 1041, 1052-53 [(Ala.Crim.App.1988) (citations omitted). In *Hope v. State*, 521 So.2d 1383 (Ala.Crim.App.1988), this Court affirmed the trial court's judgment denying the appellant's Rule 20 petition based on newly discovered evidence, where the trial court did not find the witnesses presenting the new evidence to be credible. This Court, per Judge Bowen, held as follows:]

" 'Here there is no evidence that the trial judge abused his discretion in denying a new trial on the grounds of newly discovered evidence based on the lack of credibility of the witnesses presenting the new evidence. *Williams v. State*, 489 So.2d 4, 5-6 (Ala.Cr.App.1986). "One condition of the trial court's granting a new trial on the basis of newly discovered evidence is that the court must believe the evidence presented at the hearing." *McDonald v. State*, 451 So.2d 440, 442 (Ala.Cr.App.1984).

*9 " 'Since a coram nobis petition "serves as a motion for a new trial on the ground of newly discovered evidence[,]" *Groce v. State*, 48 Ala.App. 709, 711, 267 So.2d 499 (1972), there exists a presumption favoring the correctness of the trial court's ruling on a petition for writ of error coram nobis. *Brooks v. State*, 248 Ala. 628, 631, 29 So.2d 4 (1947). "The granting of a motion for a new trial was addressed to the sound discretion of the trial court and will not be revised on appeal unless it clearly appears that the discretion has been abused." *Nichols v. State*, 267 Ala. 217, 228, 100 So.2d 750 (1958). "The trial court is in the best position to determine the credibility of the new evidence." *Isom v. State*, 497 So.2d 208, 212 (Ala.Cr.App.1986). "It is basic that in consideration of the sufficiency or insufficiency of the evidence to support the verdict, we cannot weigh[ ] the evidence or test the credibility of witnesses." *Walker v. United States*, 301 F.2d 94, 95 (5th Cir.1962).'

" *Id.*, at 1387-88."

Johnson v. State, 564 So.2d 1019, 1022 (Ala.Crim.App.1989).

A.

[8] Initially, the appellant contends that the bullets that were recovered from the three crime scenes cannot be linked to a single gun or to the revolver officers recovered from his mother.

At trial, the State presented the following evidence:

David Higgins testified that he was a firearm and toolmark examiner with the Alabama Department of Forensic Sciences; that he had been doing firearm and toolmark examinations since the early 1970s; that he had testified as an expert on quite a few occasions; and that he worked with Lawden Yates. He also testified that, initially, a different revolver was compared to the Davidson bullets and that testing did not reveal a match.

Higgins testified that, in conducting examinations, he test-fires bullets and compares them to each other to look for repetitive and accidental markings; that repetitive markings are those that are characteristic for a particular gun barrel based on something permanent within the barrel of the gun through manufacture, use, or abuse; that such marks are left on the sides, or bearing surface, of the bullet as it passes through the barrel of the gun; that repetitive markings are the ones that are used to determine whether a bullet was fired from a particular gun; that a gun barrel also leaves microscopic striations; that accidental markings are also sometimes made by things such as a fleck of metal from a previously fired bullet; and that accidental markings are not repetitive. He also testified

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

-- So.2d ---, 2006 WL 1125605 (Ala.Crim.App.)
(Cite as: 2006 WL 1125605 (Ala.Crim.App.))

that there are spiral cuts down the barrel called lands and grooves, or rifling; that the high place is the land, and the low place is the groove; that lands and grooves vary in number and turn either to the right or the left; that the lands and grooves leave marks on a bullet's bearing surface as it travels through the barrel; and that the pattern from barrel to barrel is unique. He further testified that he examines bullets using a comparison microscope; that such a microscope allows a person to look at two bullets at the same time side by side; and that he can determine that bullets match if the lands and grooves and microscopic striations or scratches on the bullets line up the same way on the bullets.

***10** Higgins testified that, on July 31, 1985, he examined the two Davidson bullets and the revolver that was recovered from the appellant's mother; that he test-fired the revolver and recovered the bullets; that he compared the test bullets to each other to determine what repetitive markings the revolver left on the bullets; that he compared the test bullets to the Davidson bullets using a comparison microscope; and that he concluded that there was a match, or that the Davidson bullets had been fired from the revolver that was recovered from the appellant's mother.

On cross-examination, Higgins admitted that the condition of a bullet can affect his ability to make a comparison; that test bullets are not usually marked, mutilated, or deformed by outside influences, but evidence bullets usually are; that firing a gun could eventually alter the barrel; that a barrel that has been altered will not leave clean marks like a clean barrel would; and that the Davidson bullets had some deformities. He also admitted that the revolver that was recovered from the appellant's mother was old; that, when it was manufactured, it used corrosive primers; and that the inside of the barrel can be altered if corrosive primers are used and the barrel of the gun is not cleaned for a long time.

Lawden Yates testified that he was a firearm and toolmark examiner with the Alabama Department of Forensic Sciences; that he had worked with the department since 1972; and that he had testified as an expert on many occasions. He also testified that gun barrels have lands and grooves and that, no matter how careful the manufacturer is, there are microscopic defects in the areas of the lands and grooves; that each barrel has its own microscopic imperfections and is unique; that, as a barrel is subjected to extensive wear over a long period of time, some markings will wear off and others will be produced; that striations are microscopic defects or scratches; and that it would be impossible to determine whether bullets matched without using a comparison microscope.

Yates testified that he initially compared the two Vason bullets to another revolver and determined that there was not a match. He also testified that, on July 3, 1985, he compared the Davidson and Vason bullets and determined that they had all been fired through the same barrel; that, on July 29, 1985, he compared the Davidson, Vason, and the two Smotherman bullets and determined that they had all been fired through the same barrel; and that he compared the Davidson, Vason, and Smotherman bullets to the test bullets and determined that the Davidson, Vason, and Smotherman bullets had been fired from the revolver that was recovered from the appellant's mother. Yates explained that he reached his conclusion based on the fact that the bullets had the same microscopic striations or scratches; that they had the same class characteristics—.38 caliber, skid marks from a revolver, and a problem with alignment of the cylinder; and that the revolver that was recovered from the appellant's mother was a .38 revolver that had an alignment problem with the chamber of the cylinder.

***11** At trial, the defense presented the following evidence:

Andrew H. Payne, Jr., testified that he was a consulting engineer and that he had studied firearms and projectiles; that he was in the gunnery program

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

and became an instructor while he was in the military on active duty; that, when he entered the military reserves, he continued to be involved with firearms; that he was involved with the design of gun barrels for the military almost from the time he entered the military in 1942; that he was also involved with the testing of firearms and bullets on an almost daily basis; that he had examined bullets that had been fired from handguns; that he was a member of the weapons evaluation board for the Air Force for about five years; and that, at various times during his military career, he served as the director of a technical services laboratory, director of the armament development laboratory, and technical assistant to the deputy chief of staff for research and technology. [FN1] He also testified that, based on his training and experience, he was familiar with toolmarks; that he had testified as an expert witness on firearm identification; and that he had previously given opinions or advice concerning toolmarks and toolmark identification. He further testified that he had used a comparison microscope to look at bullets thousands of times.

Payne testified that, in July and August 1986, he examined the Davidson, Vason, and Smotherman bullets, the test bullets, and the revolver that was recovered from the appellant's mother; that the revolver was at least 40 or 50 years old; that, when the revolver was manufactured, chlorate primers were normally used; that chlorate primers left salt deposits in the barrel that would form acids that were corrosive to the barrel and could cause rust; that, over time, such corrosion can substantially obliterate a barrel's toolmarks; that it appeared to him that corrosive ammunition had been fired through the revolver; that the revolver's toolmarks had been substantially dulled and were not distinct, that it was almost bare of lands and grooves, and that there were actually holes eaten back in several places; and that he tried to get a reading on the width of the lands and grooves, but could only get an estimate because of the worn condition of the edges. He also testified that, based on his examination, the Davidson, Vason, and Smotherman bullets had not been fired from the revolver that was recovered from the appellant's mother.

On cross-examination, Payne admitted that he had difficulty using Yates' comparison microscope because he had not previously used one from that particular manufacturer [FN2]; that he thought he had testified in only two previous criminal cases; that he did not know whether or not he would be paid for his work on the case; and that his vision was impaired because he had only one eye.

During the Rule 32 proceedings, the appellant's counsel took the depositions of Higgins and Yates and introduced them into evidence during the evidentiary hearing. Their testimony from their depositions follows:

*12 Higgins testified that he did not believe that Payne had the same qualifications he and Yates had; that Payne did not know how to turn on their microscope, but took over after that; and that Payne may have had difficulty adjusting the microscope, but that could happen to anyone who was not familiar with their particular microscope. He also testified that the office uses worksheets when conducting an examination; that, for bullets, those worksheets include spaces for information about the source, the diameter, the number of lands and grooves, the direction of twist, the width of the land impression, the width of the groove impression, the weight, the type, the condition, the number of cannelures, the markings, and the make; and that the worksheets also had a place for information about test bullets.

Higgins testified that he and Yates looked at each other's evidence in the Davidson and Vason cases because the facts sounded similar; that they determined that the bullets had been fired from the same gun; and that, after they received the revolver that was recovered from the appellant's mother, they test-fired it. He also testified that the Davidson bullets were

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

mutilated and had apparently been fired from a gun that was out of time, or in which the cylinder did not line up perfectly with the barrel; that the lands and grooves were not really discernible, but the bullets both had a skid caused by the gun being out of time; that the twist and the land and groove widths were not really discernible; and that, because of these deficiencies, when he initially examined them, he could not determine whether or not they were fired from the same gun because of the mutilation. Higgins further testified that, after he received the revolver that was recovered from the appellant's mother, he obtained test bullets; that the test bullets had enough striations, or microscopic markings from the inner surface of the barrel, to allow him to make a comparison to the Davidson bullets; and that he concluded that the Davidson bullets had been fired from the revolver. Finally, he testified that the worksheets did not include information about certain class characteristics or timing problems; that he did not reach his conclusion that the bullets were fired from the revolver based on any class characteristics; and that he based his conclusion that the bullets were fired from the revolver on the unique or individual microscopic striations he observed on the Davidson and the test bullets.

Yates testified that he was not impressed with Payne's capabilities in firearm and toolmark identification; that he seemed to have only a limited ability to do the type of work he and Higgins were doing; that he did not know how to use their microscope and asked for help several times; and that the tools he brought did not seem to be appropriate. He also testified that, while he is conducting an examination, he uses a worksheet to make notes; that he makes notes on the worksheet for his convenience to assist in making a written report; and that the written report is prepared later and sent to the relevant parties.

*13 Yates testified that Higgins initially examined the Davidson bullets, and he initially examined the Vason and Smotherman bullets; that, before the revolver was located, they compared the Davidson, Vason, and Smotherman bullets to each other and determined that they had all been fired from the same gun; and that he later noted that the revolver was out of time. He also testified that he used dashes and question marks on his worksheets in some places because some of the class characteristics of various bullets were not readily discernible due to mutilation; that there were some areas of lands and grooves that were discernible on the bullets, but they could not be measured accurately and meaningfully due to mutilation; that he concluded that the bullets had been fired from the revolver based on striations, or microscopic markings from the inside of the barrel; and that he had examined the entire bearing surface of each bullet for striations. Finally, he testified that the test bullets were taken to the court for the trial, that they were not admitted into evidence, and that they were apparently lost.

During the evidentiary hearing, the appellant presented the following witnesses:

Lannie Emanuel testified that he is a firearm and toolmark expert at the Southwestern Institute of Forensic Sciences in Dallas, Texas; that he has had extensive training and has been doing firearm and toolmark examinations since 1979; that he is a member of the Association of Firearm and Toolmark Examiners ("AFTE"); and that he has conducted thousands of examinations and has testified in more than 250 cases. He also testified that he became involved in this case in 1992; that he and Ray Cooper initially examined a gun and some bullets in Alabama; and that he later examined the gun and bullets in Texas.

Based on his examination, Emanuel testified that he concluded that the Davidson bullets (State's Exhibits 2 and 8) had been fired from the same gun; that he was not able to determine whether or not the Vason bullets (State's Exhibits 23 and 24) had been fired from the same gun; and that he was not able to determine whether or not the Smotherman bullets (State's Exhibits 54 and 55) had been fired from the

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

same gun. He also testified that he performed a microscopic comparison of the Davidson, Vason, and Smotherman bullets and test bullets that were fired from the revolver that was recovered from the appellant's mother; that he could see lands and grooves on the test bullets, but could not see them on the Davidson, Vason, and Smotherman bullets; that all of the bullets that were test fired from the revolver that was recovered from the appellant's mother had a land and groove signature of five right; that he examined two bullets that were labeled "pre-cleaning tests"; and that he could not find sufficient striations to convince him that any of the Davidson, Vason, or Smotherman bullets had been fired from the revolver that was recovered from the appellant's mother. (R. 76.) Emanuel further testified that the Smotherman bullets appeared to have been fired from a revolver that was "severely out of time"; that the revolver that was recovered from the appellant's mother had a timing problem, but it did not produce bullets that looked like the Smotherman bullets; and that, even when he made the revolver fire as far out of time as he could,[FN3] it still did not produce the degree of damage one of the Smotherman bullets had. (R. 81.) During the appellant's direct examination of Emanuel, the following also occurred:

***14** "[THE APPELLANT'S COUNSEL:] ... Is [the revolver that was recovered from the appellant's mother] capable, mechanically capable, of producing a bullet like the bullet recovered in State's Exhibit 54 [one of the Smotherman bullets]?

"[EMANUEL:] Based on the testing that we've conducted, if it's fired normally without some type of external manipulation, no, I don't believe it's capable.

"[THE APPELLANT'S COUNSEL:] How about even when it's manipulated as you did in your laboratory, were you able to get a bullet that was comparable to the bullet in State's Exhibit 54?

"[EMANUEL:] No, we were not."

(R. 86.)[FN4]

On cross-examination, Emanuel admitted that the Davidson bullets were deformed and that the deformities limited his ability to determine class characteristics such as lands and grooves; that bullets fired from the same gun would not always have deformities on the same portion of the bullet; that the revolver that was recovered from the appellant's mother had wear and tear, but he could not determine whether corrosive primers or something else caused it; that his partner first test-fired the revolver that was recovered from the appellant's mother on April 21, 1994; and that he made his determinations about the Davidson, Vason, and Smotherman bullets in 1994. He also testified that there were scratches and marks on the bullets that could be observed using a comparison microscope, that he had used a comparison microscope, and that he still could not find sufficient striations to convince him that the bullets had been fired from the revolver that was recovered from the appellant's mother. However, he admitted that it was not impossible to use a microscopic comparison to make a match on a bullet that had been deformed to the extent that lands and grooves were not discernible. Although he testified that there were not sufficient individual marks to determine that the Vason bullets were fired from the same gun and the Smotherman bullets were fired from the same gun, he also admitted that he could not conclude that the Vason bullets were not fired from the same gun and that the Smotherman bullets were not fired from the same gun.

Raymond Cooper testified that he is a firearm and toolmark examiner with the Southwestern Institute of Forensic Sciences in Dallas, Texas; that he has had extensive training and has been doing firearm and toolmark examinations since 1972; and that he has conducted more than 5,000 examinations and has testified between 250 and 350 times. He also testified that he performed examinations of the revolver that

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

--- So.2d ----, 2006 WL 1125605 (Ala.Crim.App.)
(Cite as: 2006 WL 1125605 (Ala.Crim.App.))

was recovered from the appellant's mother and various bullets from this case in both Alabama and Texas.

Based on his examination, Cooper testified that he concluded that the Davidson bullets had been fired from the same gun; that he could not determine whether or not the Vason bullets had been fired from the same gun; and that he could not determine whether or not the Smotherman bullets had been fired from the same gun. He also testified that the revolver that was recovered from the appellant's mother showed some out of time problems in certain instances [FN5]; that he could not determine that the Davidson, Vason, or Smotherman bullets had been fired from the revolver; and that he manipulated the revolver so that it would fire as far out of time as possible, but he still could not make it produce a bullet that would match the severe out of time characteristics that he saw in the Smotherman bullets. During Cooper's testimony about this process, the following occurred:

*15 "[COOPER:] Well, [I] basically threw all caution to the wind, because any time that you take a weapon and intentionally take it out of time, it's got to be done by holding it. So as Mr. Emanuel stated earlier, if you take it—if something happens and it's too far out of alignment when it fires, not too good results can happen from that.

"But that's what I did. I intentionally took the weapon out of time to see how far we could take it out of time and start back to the point to where we could get a detonation of that cartridge.

"[THE APPELLANT'S COUNSEL:] And taking this weapon and putting it as far out of time as you possibly could, were you able to produce a bullet that would match the kind of severe out of timing that we see in State's Exhibit 54?

"[COOPER:] No. [T]he problem ... with doing that is that you're manually holding that cylinder out of time. So when that cartridge detonates and that bullet starts down that barrel, it's going to hit the forcing cone first. And what it does when it hits that forcing cone, it forces that cylinder over so that it can align itself with the barrel. So I couldn't—I could not physically hold that cylinder out of time in order for that bullet to extrude like it did in 54.

"[THE APPELLANT'S COUNSEL:] In your opinion, does the mechanical condition of this gun make it impossible for it to produce the kind of bullet we see in State's Exhibit 54?

"[COOPER:] In the testing that I was involved in, I could never reproduce what had happened in State's Exhibit 54 and 55." [FN6]

(R. 120–21.) Cooper further testified that the Davidson, Vason, and Smotherman bullets did not show class characteristics, but the test bullets that were fired through the revolver that was recovered from the appellant's mother showed class characteristics of five right.

On cross-examination, Cooper admitted that his testing and manipulations of the revolver that was recovered from the appellant's mother were limited by concerns for personal safety and limited by "the hand strength of holding back a bullet that is exiting at a high rate of speed forcing the chamber back into alignment." (R. 122.) [FN7] He also admitted that he could not make a determination that the Vason bullets had not been fired from the same gun and that the Smotherman bullets had not been fired from the same gun; that there were not sufficient striations or class characteristics for him to conclude that any of the Davidson, Vason, or Smotherman bullets had been fired from the revolver that was recovered from the appellant's mother; and that he agreed with the State's experts that there were not sufficient markings on the surface to make class characteristic determinations.

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

John H. Dillon, Jr., testified that he is a self-employed forensic consultant with a specialty in firearm and toolmark identification and shooting reconstruction; that he has had extensive training and has been doing examinations since 1976; that he has trained many other firearm and toolmark examiners; that he has testified as an expert in more than 70 cases; and that he is a member and immediate past president of AFTE. He also testified that he became involved with this case in 1999; that he reviewed documentation and the trial and deposition testimony of Yates and Higgins; and that he independently examined the bullets and the revolver that were involved in this case. Based on his examination, he testified that there were sufficient marks for him to conclude that the Davidson bullets had been fired from the same gun; that there were not sufficient marks on the Vason bullets to determine that they had been fired from the same gun; and that there were not sufficient marks on the Smotherman bullets to determine that they had been fired from the same gun. He also testified that the revolver that was recovered from the appellant's mother had suffered abuse and fired out of time and that he could not determine whether or not the Davidson, Vason, and Smotherman bullets had been fired from that revolver. Finally, he testified that disagreement among examiners is possible, but not very common.[FN1]

***16** In its order on the petition, the circuit court found as follows:

> "Hinton alleges that newly discovered material facts prove that the gun recovered from his mother's home was not the gun that fired the bullets in the Davidson/Vason murders and the Smotherman robbery....
>
> "... Hinton failed to meet his burden of proving these allegations under Rule 32.3 because he did not present any evidence proving that the gun recovered from his mother's house was not the gun that fired the bullets in the Davidson/Vason murders and the Smotherman robbery. In addition, these allegations fail to qualify as 'newly discovered material facts' under Alabama Rule of Criminal Procedure 32.1(e) because the evidence presented at the evidentiary hearing was cumulative to the evidence that was presented at trial and, thus, it would not have changed the outcome of the trial.
>
> "At trial, Hinton presented the testimony of Andrew H. Payne, Jr., a consulting engineer who studied firearms and projectiles. (T.R. 1571–1667) Since this trial, Mr. Payne has been qualified as an expert witness in firearms and projectiles in several courts across Alabama. Mr. Payne testified that the type of bullets fired from the gun recovered at Hinton's mother's house used a corrosive primer that eventually corroded the striations inside the barrel of the gun. (T.R. 1616–1617) Mr. Payne further testified that the striations in this gun had been corroded away and that it would not be possible to make a positive final match between this gun and any expended bullets. (T.R. 1618–1621) Further, Mr. Payne testified that the bullets from all three crime scenes did not match. (T.R. 1631–1637)
>
> "At the evidentiary hearing, Hinton presented the testimony of three ballistics experts: Lannie G. Emanuel, Raymond E. Cooper, and John Dillon. (R. 61–150) All three experts testified that the projectiles recovered from John Davidson's body were fired from the same weapon. (R. 70, 116, 141) All three experts testified that they were unable to determine *whether or not* all six projectiles recovered from the three crime scenes were fired from the same weapon; rather, their testing was *inconclusive*. (R. 100–101, 123, 147, 149)[2] Also, all three experts testified that they were unable to determine whether or not all six projectiles were fired from the weapon recovered from Hinton's mother's home; rather, that their results were inconclusive. (R. 77, 119, 143–147, 149) In other words, these expert witnesses could not exclude the possibility that Hinton's gun fired those six projectiles. (R. 100)

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

"Hinton did not present evidence proving that the recovered projectiles were not fired from the gun recovered at his mother's house. Rather, Hinton's experts testified that while they could not make a conclusive match between the six projectiles and his weapon, they could not exclude the possibility that those projectiles were fired from that weapon. (R. 100) Therefore, this is not new evidence exonerating Hinton. At trial, Hinton presented expert testimony that excluded the possibility that the six projectiles were fired from the weapon recovered from his mother's house. (T.R. 1637) As a result, this latest expert testimony is less persuasive of innocence than the expert testimony presented at trial.

*17 "Because this expert testimony presented at the evidentiary hearing was offered for the same purpose as the expert testimony at Hinton's trial, this expert testimony is cumulative to the evidence that was presented at trial. Also, because this expert testimony was less compelling of innocence than the expert testimony presented at trial, this evidence would not have changed the outcome of the verdict and it amounts merely to impeachment evidence. Accordingly, this claim is dismissed because it does not meet the requirements of newly discovered material facts under Rule 32.1(e) and because this evidence does not prove that Hinton is innocent of the crimes for which he was convicted.

"In addition, this allegation does not meet the requirement of Rule 32.1(e)(1) as newly discovered material facts because the evidence must have been incapable of discovery at the time of trial or at the time of filing post-trial motions. *See* Rule A.R.Cr.P. 32.1(e)(1)....

"

"2 Raymond Cooper testified that he was able to exclude the bullet in Exhibit # 54 as having been fired from the gun recovered at Hinton's mother's house because he could not get the gun to fire a bullet with as much skidding as there was on # 54. (R. 120–121) However, Lannie Emanuel admitted that they only tested one cylinder. (R. 90) Cooper and Emanuel testified that they tried to hold it open with one hand, which was very dangerous and impossible to do. (R. 83, 120–122)"

(C.R. 1521–25.) The record supports the circuit court's findings, and we adopt them as part of our opinion.

At trial, Payne testified unequivocally that the Davidson, Vason, and Smotherman bullets were not fired from the revolver that was recovered from the appellant's mother. Further, contrary to the appellant's assertions in his brief and during oral argument to this court, the testimony of his Rule 32 experts was not as favorable to the defense. As set forth herein, Emanuel and Cooper carefully phrased their answers, discussed the limitations on their testing, and indicated that any conclusions they reached with respect to the Smotherman bullets and the revolver that was recovered from the appellant's mother were based on the fact that *they could not reproduce the same type of bullet.* The circuit court, which observed the witnesses and, on several occasions, asked them very specific questions about their testing and conclusions, was in the best position to determine the credibility of the witnesses and their testimony. As its order indicates, the circuit court apparently concluded that their testimony was not sufficient to establish that any conclusion that the revolver that was recovered from the appellant's mother did not fire the Smotherman bullets was not valid.

Rule 32.3, Ala. R.Crim. P., provides, in pertinent part:

"The petitioner shall have the burden of pleading and proving by a preponderance of the evidence the

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

facts necessary to entitle the petitioner to relief."

***18** Because the Rule 32 experts' testimony was not as conclusive as Payne's unequivocal trial testimony, the circuit court could have reasonably concluded that the appellant had not proved his claim by a preponderance of the evidence; that Payne's trial testimony was more compelling than that of the Rule 32 experts; that the appellant did not show that the outcome of his trial probably would have been different if the new evidence had been presented at trial; and that the new evidence did not establish that he is innocent of the crime for which he was convicted. *See Johnson*, supra; Rules 32.1(e) and 32.3, Ala. R.Crim. P.

[9] Finally, during the evidentiary hearing, the circuit court stated:

"What if we come up with some different experts later on that are even more recognized as the ultimate experts? That's what we're getting into is a swearing contest between experts.

"....

"... It concerns me that we're going to get into a situation where somebody—one party feels that they have a better expert than was presented the last time, therefore the evidence is more believable. And that issue has already been addressed by a jury. This is a question of fact, not a question of law, and the question of facts are decided by the jury. I would be in essence second-guessing the jury and [its] determination based on the evidence that was presented to [it] on the same issues."

(R. 10, 16.) We share the circuit court's concerns, and we note that a party cannot go back after the trial to secure what he considers to be a more qualified expert. Allowing a party to do so would be contrary to the requirement of Rule 32.1(e)(2), Ala. R.Crim. P., that evidence not be merely cumulative to other facts that were known. Also, in such circumstances, proceedings might never end because, theoretically, better experts might always be found. The appellant had a chance to present expert testimony to the jury, and he did so. In fact, as we explain throughout this opinion, Payne's testimony was much more favorable than that of the Rule 32 experts.

For the reasons set forth herein, the appellant has not shown that this new evidence satisfies the requirements of Rule 32.1(e), Ala. R.Crim. P. Therefore, he is not entitled to relief on this claim.

B.

The appellant also contends that new evidence shows that he did not plan or commit the murders.

1.

[10] The appellant asserts that "the new evidence makes it clear that no reasonable basis exists for believing that Mr. Hinton could leave his place of work sometime after 12:10 a.m., travel fifteen miles and expect that restaurant employees at the Quincy's would still be there when he arrived." (Appellant's brief at p. 25.) He bases his argument on the fact that LaTonya Herron and Robert Stephenson testified during the evidentiary hearing that the time Quincy's employees locked the restaurant and left varied from night to night.

In its order on the petition, the circuit court found as follows:

***19** "Hinton alleges that newly discovered material facts prove that he was at work in a secure warehouse facility at the time of the Quincy's robbery, which is the crime that tied him to the Davidson/Vason murders. This alleged 'new evidence' is not newly discovered evidence under Alabama Rule of Criminal Procedure 32.1(e) because it was presented at the trial in 1986. Thus, this alleged 'new evidence' is cumulative to the evidence that

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

was presented at trial and it obviously did not change the outcome of the trial.

"At trial, Hinton presented the testimony of Larry Lochrico, the shift supervisor at the Bruno's warehouse where Hinton was working. (T.R. 1337–1385) Mr. Lochrico kept employment records and he testified that the records showed that Hinton arrived at work at 11:57 p.m. on July 25, 1985, that Hinton worked until 6 a.m., that part of the warehouse was fenced in, that there were alarms on the doors, and that the alarms did not always work. (T.R. 1338–1374) Hinton presented the testimony of Tom Dahl, the supervisor of temporary employees at the Bruno's warehouse and his supervisor on the night of the Smotherman robbery. (T.R. 1386–1415) Mr. Dahl testified that he saw Hinton three times during the first two hours of his work shift on July 25, 1985, but that he did not see Hinton every thirty minutes. (T.R. 1387–1407) Hinton presented the testimony of Lloyd Warnken, the head of security for the Bruno's warehouse. (T.R. 1416–1453) Mr. Warnken testified that all the gates to the warehouse were guarded, that there were records of people entering and exiting the warehouse, and that the doors sounded loudly when opened. (T.R. 1422–1442) In addition, Hinton testified that he was at work in the Bruno's warehouse at the time of the Smotherman robbery. (T.R. 1458–1475)

"At the evidentiary hearing, Hinton's counsel conceded that his trial counsel put on 'a very, very powerful alibi.' (R. 56) Because the evidence Hinton alleges as new was presented at the trial, this evidence was not permitted at the evidentiary hearing. Accordingly, this claim is dismissed because it does not meet the requirements of newly discovered material facts under Rule 32.1(e).

"In addition, this allegation does not meet the requirement of Rule 32.1(e)(1) as newly discovered material facts because the evidence must have been incapable of discovery at the time of trial or at the time of filing post-trial motions. *See* A.R.Cr. P. 32.1(e)(1)."

(C.R. 1525–28.) The record supports the circuit court's findings, and we adopt them as part of this opinion. We also note that, at trial, the appellant presented extensive alibi evidence and evidence about how difficult it would have been for him to be at work and to get to Smotherman's location in a short span of time. Therefore, such evidence would have been cumulative to that presented at trial and would have constituted impeachment evidence. *See* Rule 32.1(e)(2) and (3), Ala. R.Crim. P. We further note that the appellant did not show that the outcome of his trial probably would have been different if the new evidence had been presented at trial and that the new evidence did not establish that he is innocent of the crime for which he was convicted. *See* Rule 32.1(e)(4) and (5), Ala. R.Crim. P. Therefore, he has not satisfied his burden of pleading and proof pursuant to Rules 32.1(e), 32.3, and 32.6(b), Ala. R.Crim. P., as to this claim. Accordingly, he is not entitled to relief in this regard.

2.

***20** [11] The appellant also asserts that Smotherman's identification was not reliable.

a.

First, the appellant alleges that Smotherman initially mistook Leon Perry as the perpetrator, mistook Perry's Mercedes automobile for a Porsche automobile, and referred to the perpetrators as "they." In its order denying the petition, the circuit court found as follows:

"Hinton alleges that newly discovered material facts prove that Mr. Smotherman's identification of the assailant and the assailant's car was unreliable because Mr. Smotherman initially mistook Leon Perry as the assailant immediately after the robbery.

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

Hinton failed to meet his burden of proving this allegation under Alabama Rule of Criminal Procedure 32.3 because Hinton never presented evidence of Mr. Smotherman mistaking Leon Perry as the robber. Rather, Hinton only offered evidence showing that Mr. Smotherman described Leon Perry's car as 'look[ing] like a late model Porsche or a very nice car' when it was actually a Mercedes. (R. 198; Petitioner's Exhibit 20) Therefore, the evidence offered at the evidentiary hearing would not qualify as newly discovered evidence under Rule 32.1(e) because, at best, this would only be impeachment evidence. This description of the car in which Mr. Smotherman rode to the hospital after being robbed and shot in the head would not have changed the outcome of the trial and it does not establish that Hinton is innocent of the crimes for which he was convicted. *See Dobyne v. State*, 805 So.2d 733, 753 (Ala.Crim.App.2000)(Petitioner who presented no evidence in support of claim did not meet his burden of pleading and proving by a preponderance of the evidence facts that would entitle him to relief under Rule 32.3.).

"At trial, Mr. Smotherman testified that he left the Quincy's after the shooting and that he ran to the Motel 6 across the parking lot. While doing this, he saw a car and it scared him:

" 'Mr. McGregor: What, if anything, did you do when you left the store after being shot?

" 'Mr. Smotherman: I went across the parking lot going over to Motel 6 as I was—

" 'Mr. McGregor: Did you get there?

" 'Mr. Smotherman: Yes, sir; as I was going across the lot a car pulled in like he was going up toward Motel 6 and I thought; My Goodness! That may be him, he's watching or something, so I ran down toward that little Waffle House and they called—

" 'Mr. McGregor: Did you get there?

" 'Mr. Smotherman: Sir?

" 'Mr. McGregor: Did you get there?

" 'Mr. Smotherman: Almost.

" 'Mr. McGregor: What happened then?

" 'Mr. Smotherman: The car had already gone up and parked at Motel 6 and they were apparently opening their trunk like guests so I went on up to the motel. I walked in the lobby and told the manager I've been shot and robbed and I need help, please, call the police. And he said, come on in the office. So I went in the officer [sic], the manager was there and his night security man, I think, was the other man, he came in there. And he called the Bessemer police and I asked him to dial my district leader's number so I could tell him what happened. He dialed the district leader and I talked to the district leader and told him I'd been robbed and shot. He told me to stay with the emergency people and not to worry about the store he was going to the store. The car that had pulled in was driven by Leon Perry, professional football player.

***21** " 'Mr. McGregor: Did you know him at that time, Mr. Smotherman?

" 'Mr. Smotherman: No, sir; that's when I met him.'

"(T.R. 889–890) Accordingly, the record clearly shows that Mr. Smotherman did not mistakenly identify Leon Perry as the robber or his car as the robber's car. Therefore, this claim is dismissed be-

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

> cause Hinton failed to meet his burden of proving this allegation and the evidence that he did offer fails to state a claim of newly discovered material facts."

(C.R. 1530–33.) The record supports the circuit court's findings, and we adopt them as part of this opinion. Therefore, the appellant is not entitled to relief in this regard.

b.

Second, the appellant alleges that new evidence shows that he did not own a vehicle that matched the description Smotherman gave for the perpetrator's vehicle. Specifically, he proffered documents that showed that his green Chevrolet vehicle had been repossessed before the Smotherman offense occurred. However, at trial, he presented evidence that the green Chevrolet had been repossessed and that he was driving a red Nissan vehicle. Therefore, the alleged new evidence was simply cumulative to evidence the defense presented at trial. *See* Rule 32.1(e)(2), Ala. R.Crim. P. Accordingly, he is not entitled to relief pursuant to Rule 32.1(e), Ala. R.Crim. P., on this claim.

c.

Third, the appellant alleges that new evidence shows that Robert Stephenson was in the Food World with Clark Hayes; that he did not see a strange person in the store; that he was pressured by a Bessemer law enforcement officer to identify the appellant; and that he was ostracized by Quincy's employees because he would not identify the appellant. In its order on the petition, the circuit court found as follows:

> "At the evidentiary hearing, Hinton presented the testimony of former Quincy's employees Robert Stephenson and Latonya Herron. Both Stephenson and Herron testified that they were at Food World on the night of the Smotherman robbery and that they did not see Hinton there; however, they testified that he did not see anyone strange there that night. (R. 151–152, 168) In addition, Herron also testified that she did not see Mr. Smotherman there, even though it was well established that Mr. Smotherman was there that night. (R. 172) This testimony does little to discredit the testimony of Clark Hayes because they did not testify that they saw the same suspicious person that Clark Hayes saw, but that it was not Hinton; rather, their testimony was that they did not see anyone suspicious at the Food World that night and that they did not see Hinton. Thus, presentation of this evidence would have had little effect on the verdict...."

(C.R. 1560.) The record supports the circuit court's findings, and we adopt them as part of this opinion. Also, the evidence presented at the trial showed that Stephenson went to the Food World when Smotherman and Hayes did. Therefore, the appellant has not shown that

> ***22** "[t]he facts relied upon were not known by the petitioner or the petitioner's counsel at the time of trial or sentencing or in time to file a posttrial motion pursuant to Rule 24, or in time to be included in any previous collateral proceeding and could not have been discovered by any of those times through the exercise of reasonable diligence."

Rule 32.1(e)(1), Ala. R.Crim. P. Further, the evidence would have constituted impeachment evidence at most. *See* Rule 32.1(e)(3), Ala. R.Crim. P. Finally, the appellant did not show that the outcome of his trial probably would have been different if the new evidence had been presented at trial and that the new evidence did not establish that he is innocent of the crime for which he was convicted. *See* Rule 32.1(e)(4) and (5), Ala. R.Crim. P. Accordingly, he is not entitled to relief on this claim.

3.

[12] Finally, the appellant asserts that crimes with the same modus operandi continued in the Birmingham area after he was arrested. In its order on the

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

petition, the circuit court found as follows:

"Hinton alleges that newly discovered material facts prove that the actual perpetrator of the Davidson/Vason murders was continuing to commit similar crimes after he was arrested. This allegation does not qualify as newly discovered material facts under Alabama Rule of Criminal Procedure 32.1(e) because this evidence was presented at trial and, thus, it would not have changed the outcome of the trial.

"At trial, Hinton presented the testimony of Birmingham Police Investigator James Chambliss, who testified that crimes similar to the Davidson and Vason murders occurred after Hinton was arrested and that no one had been apprehended for those crimes. (T.R. 1311–1320) Any additional testimony of facts that were already presented to the jury is cumulative, it obviously did not change the outcome of the verdict, and it does not prove that Hinton is innocent of the crimes for which he was convicted. Thus, this claim is dismissed because it does not qualify as a new discovered material fact under Rule 32.1(e)."

(C.R. 1534.) The record supports the circuit court's findings, and we adopt them as part of this opinion. Therefore, the appellant is not entitled to relief in this regard.

II.

[13][14] The appellant's second argument is that the State did not disclose exculpatory and impeachment evidence. A criminal defendant is entitled to discover documents and tangible things "(1) [w]hich are material to the preparation of defendant's defense; ... (2) [w]hich are intended for use by the state/municipality as evidence at the trial; or (3) [w]hich were obtained from or belong to the defendant." Rule 16.1(c), Ala. R.Crim. P. "To prove a *Brady* [*v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963),] violation, a defendant must show that ' "(1) the prosecution suppressed evidence; (2) the evidence was favorable to the defendant; and (3) the evidence was material to the issues at trial." ' " *Freeman v. State*, 722 So.2d 806, 810 (Ala.Crim.App.1998) (quoting *Johnson v. State*, 612 So.2d 1288, 1293 (Ala.Crim.App.1992)). In the *Brady* context, "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985).

A.

***23** [15] The appellant contends that the State improperly withheld Department of Forensic Science ("DFS") reports. Specifically, he asserts that the reports "dispute the contention at trial that there was 'ample evidence' of a match; expose the fact that the experts changed their conclusions after re-examining the evidence; reveal that every test bullet fired from the Beulah Hinton weapon bears prominent, distinct class characteristics that were not present on the recovered bullets; [and] reveal that Yates and Higgins only assigned class characteristics to the recovered bullets *after* identifying the class characteristics of the Beulah Hinton weapon." (Appellant's brief at pp. 35–36.)

In its order on the petition, the circuit court found as follows:

"Hinton alleges that the State withheld certain ballistics worksheets containing question marks where the lands and grooves measurements of the recovered bullets should have been indicated. (Petitioner's Exhibit 19) This claim is dismissed for failure to allege or prove the facts necessary to entitle Hinton to relief in accordance with Alabama Rule of Criminal Procedure 32.3. The State's ballistics experts being unable to record land and groove measurements from the recovered bullets is not

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

exculpatory evidence because they testified that their ability to determine that there was a match was based upon the microscopic markings left on the unmutilated bearing surfaces of the bullets. (T.R. 1214–1234, 1275–1290) The State's ballistics experts' inability to make land and groove measurements on the recovered bullets has no bearing on their abilities as experts because none of the Petitioner's experts were able to make land and groove measurements, either. Furthermore, the testimony of the State's experts, taken by deposition, demonstrates that these questions marks were not material or impeachment material. Thus, this claim is dismissed because Hinton has not proved that the State withheld exculpatory evidence from him at trial."

(C.R. 1629–30.) The record supports the circuit court's findings, and we adopt them as part of this opinion.

The depositions of Higgins and Yates reveal that they determined that the Davidson, Vason, and Smotherman bullets had been fired from the same gun before they received the revolver that was recovered from the appellant's mother; that they determined that the Davidson, Vason, and Smotherman bullets had been fired from the same gun and that they had been fired from the revolver that was recovered from the appellant's mother based on microscopic striations and not based on class characteristics; that they used worksheets to make notes as they conducted their examinations and then prepared a final report; that they used some questions marks and dashes because many of the class characteristics for the bullets were not readily discernible or could not be measured accurately and meaningfully; that they could determine some general class characteristics such as caliber and that the gun from which they had been fired had a timing problem; and that they noted on the worksheets that they had found matches to the revolver that was recovered from the appellant's mother. Also, although Higgins could not initially determine that the Davidson bullets had been fired from the same gun, he explained that that was because he did not have anything with which to compare them and that an exclusion at that point would be premature. Moreover, all of the Rule 32 experts determined that the Davidson bullets had been fired from the same gun. Further, Yates testified that, because his microscopic examination of each bullet was extensive, he did not make specific notes about the striations on the worksheets. Instead, he noted on the worksheets that the bullets had been fired from the same barrel.

***24** The information on the worksheets supports, rather than disputes, Higgins' and Yates' testimony that there was ample evidence that the Davidson, Vason, and Smotherman bullets had been fired from the same gun and that they had been fired from the revolver that was recovered from the appellant's mother; it does not support the appellant's bare allegation that Higgins and Yates changed their conclusions and assigned class characteristics after examining the revolver that was recovered from the appellant's mother; and it refutes the assertion that Higgins and Yates did not find any matching class characteristics on the Davidson, Vason, and Smotherman bullets before they received the revolver that was recovered from the appellant's mother. Also, at trial, the defense thoroughly cross-examined Higgins and Yates and presented extensive testimony from Payne to refute Higgins' and Yates' testimony and conclusions. For these reasons, the appellant has not established that the worksheets were favorable to the defense and that they would have been material, or that the outcome of the trial probably would have been different if they had been disclosed to the defense. Therefore, he is not entitled to relief on this claim.

B.

[16] The appellant also contends that the State improperly withheld witness statements from the defense.

1.

The appellant asserts that the State improperly

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

withheld a statement by Robert Stephenson. Stephenson's statement is discussed in more detail in Parts I. and III. of this opinion. In its order on the petition, the circuit court found as follows:

> "Hinton alleges that the State violated his rights under *Brady v. Maryland* withheld evidence and statements that undermined the State's assertion that Hinton was in the Food World prior to the Quincy's robbery. Specifically, Hinton alleges that statements from employees of Quincy's ... were withheld. At the evidentiary hearing, ... Hinton presented the testimony of Robert Stephenson, who testified that he did speak with police; that he told police he did not see anyone suspicious at Food World the night of the Quincy's robbery; and, that he did not see Hinton there. (R. 152–158) ... Stephenson [did not testify] that [he] saw the same suspicious person that Clark Hayes saw, but that it was not Hinton. Rather, [he] testified that [he] did not see anyone that looked suspicious. Therefore, this is not exculpatory evidence because it does not prove that Hinton is innocent and it is not impeachment evidence because [this] non-witness[ ] to the crime had no helpful information about the crime. Accordingly, this claim is dismissed in accordance with Alabama Rule of Criminal Procedure 32.3 for failure to prove the facts necessary to entitle him to relief."

(C.R. 1634–36.) The record supports the circuit court's findings, and we adopt them as part of this opinion. The appellant has made bare allegations, but he has not supported them with facts and evidence. Therefore, he has not satisfied his burden of pleading and proof pursuant to Rules 32.6(b) and 32.3, Ala. R.Crim. P., and *Brady*. Accordingly, he is not entitled to relief on this claim.

2.

***25** The appellant also asserts that the State improperly withheld a statement by Leon Perry. Perry's statement is discussed in more detail in Parts I. and III. of this opinion. However, he did not raise this specific *Brady* claim in any of his petitions or during the evidentiary hearing. Rather, he raised it for the first time in his post-hearing brief. Therefore, we question whether it is properly before this court. *See Morrison v. State*, 551 So.2d 435 (Ala.Crim.App.1989).

Moreover, as set forth in Part I.B.2.a. of this opinion, much of the information was actually presented at trial. Thus, trial counsel definitely knew about Perry's involvement in the case at that time and could have questioned him about it. Further, the appellant has not established that the statement was exculpatory and material, or that the outcome of the trial probably would have been different if the evidence had been presented. Rather, he simply made bare allegations that he did not support with facts and evidence. Therefore, the appellant has not established his burden of pleading and proof pursuant to Rules 32.6(b) and 32.3, Ala. R.Crim. P., and *Brady*. Accordingly, he is not entitled to relief on this claim.

III.

The appellant's third argument is that his counsel rendered ineffective assistance at trial and on direct appeal.

A.

[17][18] First, the appellant contends that his trial counsel rendered ineffective assistance due to allegedly inadequate compensation. To the extent he challenges the statutory limit on attorney fees in capital cases, his argument is procedurally barred because he could have raised it at trial and on appeal, but did not. *See* Rule 32.2(a)(3) and (5), Ala. R.Crim. P. To the extent he raises an ineffective-assistance-of-counsel claim, he makes only the following bare allegations and conclusions:

> "Sheldon Perhacs was appointed to represent Mr. Hinton at trial. (R. 74.) Alabama law permits the appointment of two lawyers in capital cases but the

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

trial court did not appoint another lawyer to assist Mr. Perhacs. Instead. over counsel's repeated objection, the trial court took the unprecedented step of *sua sponte* consolidating two separate capital murder cases into a single trial. *See* Ex parte Hinton, 548 So.2d 562, 566 (Ala.1989) ('this is the first consolidation of capital cases in Alabama.'). To prove the two capital murder charges, the State relied on evidence of a third crime: the uncharged Quincy's robbery. Consequently, counsel had to defend against three separate cases.

"Alabama Code section 15–12–21 provided at the time of Mr. Hinton's trial that a court-appointed attorney trying a capital case could be compensated no more than $1000 for out-of-court work. Mr. Perhacs was appointed to defend—in a single trial—two separate capital murder cases and a robbery case, but his compensation remained capped at $1000. Counsel received only $1000 for his out-of-court work for the entire three-in-one trial (PR. 180), even though appointed Alabama attorneys typically received up to $1000 for *each phase* of a capital trial. *See* Ingram v. State, 779 So.2d 1225, 1279 (Ala.Crim.App.1999) ('portion of the Alabama statute, § 15–12–21(d), limiting court-appointed attorneys' fees to $1,000 for out-of-court work for *each phase* of a capital trial is [not] unconstitutional') (emphasis added).

***26** "Counsel explained at the Rule 32 hearing that Mr. Hinton's defense 'require[d] a lot of time and effort' because '[t]wo capital cases were combined for trial, but they were all contingent upon the occurrence of a third event which was a robbery at Quincy's.' (PR. 180.) Nonetheless, counsel's 'fee declaration was rejected' because 'there was no provision for payment of two cases even though they had been combined.' (PR. 180.) In addition to this extraordinary limitation, counsel was promised only $500 per case to obtain the assistance of an expert toolmark examiner (R. 2118) even though the statute authorized more funds—assistance which was indispensable to prove Mr. Hinton's innocence.

"Counsel made clear both at trial and in his Rule 32 testimony that the court-allotted funds were insufficient to provide effective assistance. (R. 42, 74, 64–70; PR. 181, 188, 207.) Not only did Alabama law place unconstitutional restrictions on compensation and resources for Mr. Hinton's defense, but Mr. Hinton was deprived even of the resources to which he was entitled under that law."

(Appellant's brief at pp. 64–66) (footnote omitted).

During the evidentiary hearing, the defense called Sheldon Perhacs, who represented the appellant at trial and on direct appeal. He testified that, when he represented the appellant, 80 percent of his practice was criminal defense work; that he was paid $1,600 for representing the appellant; that that was not adequate compensation because he spent much more time than that trying the case; that the case required a lot of effort because he was, in effect, defending three cases at one time; and that he tried to get compensated for the two capital cases, but his fee declaration was rejected. On cross-examination, Perhacs admitted that he worked more hours than those for which he was paid in the case.

[19] In its order on the petition, the circuit court found as follows:

"Sheldon Perhacs testified that the amount of money he was paid did not compromise the amount of time he spent in his representation of Hinton. (R. 179, 205) Mr. Perhacs testified extensively as to his investigation and preparation for this case. (R. 181–187) Lack of compensation, per se, is not proof of ineffective assistance of counsel. *See, e.g.*, Ex parte Smith, 698 So.2d 219 (Ala.1997); Ex parte Grayson, 479 So.2d 76 (Ala.1985); Taylor v. State,

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

808 So.2d 1148, 1204–1205 (Ala.Crim.App.2000); *Griffin v. State*, 790 So.2d 267, 347 (Ala.Crim.App.1999); *Bryant v. State*, CR–98–0023, —So.2d —, 1999 WL 1046430 (Ala.Crim.App. Nov.19, 1999); *Bui v. State*, 717 So.2d 6 (Ala.Crim.App.1998); *Burgess v. State*, 723 So.2d 742 (Ala.Crim.App.1997); *See also Foster v. Kassulke*, 898 F.2d 1144 (6th Cir.1990) ('The relationship between her attorney's compensation and his effectiveness as counsel is by no means certain. Were it so, pro bono defense counsel would be by definition "ineffective." This conclusion, of course, flies in the face of reality when it is observed that many pro bono cases are handled with a great deal of competence.')."

***27** (C.R. 1540–41.) We agree with the circuit court's findings, and we adopt them as part of this opinion. The appellant made conclusory statements about counsel's performance being impeded, but he did not support his assertions with facts and/or evidence. Therefore, he did not satisfy his burden of pleading and proof as to this claim. *See* Rules 32.3 and 32.6(b), Ala. R.Crim. P. Accordingly, he is not entitled to relief in this regard.[FN9]

B.

[20] Second, the appellant contends that counsel did not present a competent toolmark examiner. During the evidentiary hearing, Perhacs testified that firearm and toolmark examination was critical to the case because the three crimes could not be connected without it; that he attempted to locate an expert; and that locating an expert was not easy because the experts he contacted who were qualified would not take the case due to the statutory limit on compensation and because he could not find anyone local who he considered to be qualified. He also testified that he contacted firearms experts he knew and asked for their recommendations regarding an expert; that he contacted people both locally and nationally, including people in New York, Virginia, Boston, Maryland, New Orleans, and Miami; and that some of the people he contacted were not qualified and some would not take the case because of the limit on compensation. Ultimately, Perhacs hired Andrew Payne as an expert for the defense. He testified that he was happy with Payne and that Payne went out of his way to be helpful to him and to the appellant. However, he also testified that Payne did not have the expertise he thought he needed and that he did not consider Payne's testimony to be effective. On cross-examination, Perhacs stated that he did everything he knew to do to get a qualified firearms expert for the trial; that the experts he considered to be qualified would not work for the amount of money he could pay them; and that Payne brought him reference materials while he was helping with the case.[FN10]

In its order on the petition, the circuit court found as follows:

"Hinton alleges that his trial counsel was ineffective for failing to obtain and present qualified ballistics experts who could have proved that the bullets recovered from the crime scenes were not fired from the gun recovered in his mother's home....

"....

"... Hinton alleges that his trial counsel was deficient for not presenting [any] evidence that the bullets found at the crime scenes were not fired from the gun found at his mother's house; however, Hinton's counsel did put on such testimony. Hinton's counsel presented the testimony of Andrew H. Payne, Jr., a consulting engineer who studied firearms and projectiles. (T.R. 1571–1667) Mr. Payne has been qualified as an expert ballistics witness for several criminal and civil cases in Alabama. Mr. Payne testified that the type of bullets fired from the gun recovered at Hinton's mother's house used a corrosive primer that eventually corroded the toolmarkings inside the barrel of the gun. (T.R. 1616–1617) Mr. Payne further testified that the

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

toolmarkings in this gun had been corroded away and that it would not be possible to make a positive final match between this gun and any expended bullets. (T.R. 1618–1621) In addition, Mr. Payne testified that the bullets from the three crime scenes did not match. (T.R. 1631–1637) Accordingly, the trial record clearly refutes Hinton's claim that his trial counsel was ineffective for failure to present testimony in rebuttal to the State's ballistics evidence. For these same reasons, this claim is also dismissed under Alabama Rule of Criminal Procedure 32.3 for failure to meet his burden of proving the facts necessary to warrant relief."

***28** (C.R. 1545–48.)

"Hinton alleges that his trial counsel was ineffective for failing to file a motion for continuance when he realized his ballistics expert was not qualified to testify and for failing to seek additional funds to hire a better expert witness....

"....

"... Hinton alleges ... that a qualified ballistics expert would have testified that the bullets fired at the three crime scenes were not fired by the gun recovered at his mother's house; however, this is exactly what his ballistics expert testified at trial. (T.R. 1571–1668) Thus, Hinton fails to meet his burden of pleading or proving that his counsel was deficient or how he was prejudiced when the expert chosen by trial counsel testified to what he claims any other 'qualified' ballistics expert would have testified.... For these same reasons, this claim is also dismissed under Rule 32.3 for failure to meet his burden of proving the facts necessary to warrant relief."

(C.R. 1548–50.) The record supports the circuit court's findings, and we adopt them as part of this opinion.

In his brief to this court, the appellant asserts:

"Counsel complained to the trial court about not having enough money to hire a qualified expert, but when the court failed to approve additional funds despite its promise to look into it (R. 10), counsel did not assert that he was entitled to sufficient funds to hire a competent expert pursuant to *Ake v. Oklahoma*, 470 U.S. 68 (1985), nor did counsel correct the court's erroneous belief that the statute limited funds for experts to $500.[39]

"

"[39] At the time of Mr. Hinton's trial, the statute provided reimbursement to appointed counsel for *any expenses reasonably incurred* in the defense of his client, 'to be approved in advance by the trial court.' Ala.Code § 15–12–21(d) (1975)."

(Appellant's brief at p. 73.) Judge Cobb would reverse on the ground that trial counsel rendered ineffective assistance because he did not "recognize that the law regarding compensation had changed[and] proceeded to trial believing he was 'stuck' with an unqualified witness." — So.2d at —. For the reasons set forth herein, we disagree and find that the appellant's arguments are not properly before this court and are also without merit.

Initially, we note that, although the appellant briefly referenced § 15–12–21(d), Ala.Code 1975, in footnotes in pleadings before the circuit court, he never specifically argued that counsel rendered ineffective assistance because he did not know that the statute had been amended to remove the cap and because he did not correct the trial court's erroneous belief that the statute limited funds for an expert to $500. In fact, in his final amended petition, the appellant asserted:

"Petitioner was additionally denied effective as-

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

> sistance of counsel at trial by defense counsel's failure to motion for a continuance when he learned at trial that his gun expert was not qualified to testify about the ballistics evidence presented by the state in this case. Counsel was additionally ineffective to not seek additional funds when it became obvious that the individual willing to examine the evidence in the case for the $1,000 allotted by the court was incompetent and unqualified. Indeed, this failure to seek additional, sufficient funds is rendered all the more inexplicable by the trial court's express invitation to counsel to seek more funds if such funds were necessary. (R. 10–12.)"

***29** (C.R. 419.) Although the appellant presented evidence about the insufficiency of the funding during the evidentiary hearing, he never questioned trial counsel about whether or not he knew that the cap had been removed.[FN11]

Also, with regard to the cap on fees for experts, the appellant appears to be taking an inconsistent position on appeal from the one he took in the circuit court. In his post-hearing brief, he argued:

> "Mr. Perhacs made clear to this Court that he could not effectively confront the state's evidence without a qualified toolmarks expert. Mr. Perhacs acknowledged and understood that a competent toolmarks expert would be 'a pivotal witness.' (R. 55.) Mr. Perhacs explained to the Court that 'the problems are worse trying to go to trial without an expert, because no matter what anybody says about anything, this case would not get off the ground if there wasn't a ballistics comparison.' (R. 63.) *Mr. Perhacs's extensive efforts to retain a qualified expert were frustrated by the limited funds made available to him.* Without competent, qualified expert assistance, trial counsel could not effectively confront the state's case and establish Mr. Hinton's innocence. The money made available to Mr. Perhacs did not permit him to obtain the expert assistance he needed to provide effective assistance to Mr. Hinton as required by state and federal law.[21]
>
> "*Mr. Hinton's trial counsel filed an extensive motion requesting adequate compensation for his representation but was allocated only $500 per case for a toolmarks expert.* (R. 1997, 2115.) Mr. Perhacs explained in a pretrial hearing that his client's rights to a fair trial were being jeopardized by the lack of funds for expert assistance. Mr. Perhacs told this Court:
>
> " 'I'm not going to be able to bring two separate experts up here. I can only hire one and I'm limited by the amount of money I can spend on him and I can present to the Court I haven't found him or her yet, but I'm stuck with only one expert in the case. I cannot bolster that opinion by the opinion of a third or fourth or fifth expert in the case which creates the unreasonable burden on the defendant to attempt to prove his innocence....
>
> "(R. 42.) Mr. Perhacs's frustration with being unable to retain a qualified expert was made plain to this Court at a pretrial motions hearing, where Mr. Perhacs stated:
>
> " 'And I've also spent enough time that I exceeded the allowance limit just in the time I've been looking for a doggone expert. Now, I know just about everybody in the Southeast region up to Virginia who can testify about ballistics and I can tell you just about everybody who's retired, but I can't present somebody to the Court who is going to say they're going to do it for my client. Payne is the only shot I've got so far.'
>
> "(R. 62–63.) At that pretrial hearing, counsel further articulated his reluctance to hire the only 'expert' willing to testify for the money that was available, Andrew Payne:
>
> ***30** " 'I made an effort to get somebody that I

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

thought would be useable. And I'll have to tell you what I did abut [sic] Pat Payne. I called a couple of other lawyers in town who did that to ask if they knew of anybody. One of them knew him; one of them knew him. The reason I didn't contact him was because he wasn't recommended by the lawyer. So now I'm stuck that he's the only guy I could possibly produce.'

"(R. 70–71.) *Trial counsel repeatedly told this Court that he could not find a qualified independent expert to examine the recovered projectiles and the gun who would accept only the $500 fee allotted to the defense.* (R. 10–11, 54–55, 62–67, 69–70, 2115–17, 2118.) *Trial counsel unsuccessfully sought additional funds to hire a qualified expert.*[22] (R. 10–12.) Mr. Perhacs contacted over a dozen experts locally and across the country but found no qualified expert willing to travel to Alabama and work on the case for the funds that he had available. (R. 64–70.) (*See* Issue VII, *infra*, incorporated by reference.)

"

"[21] Counsel needed to know what funds would be available to him at the outset. Mr. Perhacs knew that representing Mr. Hinton would necessarily cost him money that would not be reimbursed. Mr. Perhacs articulated pretrial:

" 'If the State of Alabama would pay me the deficiency that I incur after I'm paid the fees in these cases, you know, I probably would be more selective, only take the ones that I knew I would easily prepare. But, you know, when this thing boils down, I spend money to prepare this thing... And you have to argue about getting more than a thousand dollars in these cases. ... [B]y the time I'm done, I've paid my investigator a couple of grand in these cases.'

"(R. 74.) *Assurance that funds would be available were simply not made.* Consequently, Mr. Perhacs was forced to operate on the promised '$500 per case' even though more money could have been authorized. Ala.Code § 15–12–21(d) (1975) (amended to provide reimbursement if 'approved in advance by the trial court.')

"[22] Perhacs filed a *Request for Approval of Extraordinary Expenses.* (R. 1997, 2115.) This Court granted $500 for each case. (R. 2118.)"

(C.R. 1244–46) (emphasis added).

In Issue VII of his post-hearing brief, which he incorporated into his argument about trial counsel's performance with regard to a ballistics expert, the appellant argued that "[t]he failure to provide the defense with adequate expert assistance violated [his] rights under *Ake v. Oklahoma,* and state and federal law." (C.R. 1277.) In support of his claim, the appellant contended, in relevant part:

"Mr. Hinton's defense at trial was severely constrained by a lack of resources.... Despite the fact that the entire case against Mr. Hinton turned on crucial firearms evidence, *this Court made available to Mr. Hinton only $500 per case for hiring a defense expert.* (R. 2118.) [29] ...

*31 "....

"*As a result of this Court's failure to appropriate sufficient funds, trial counsel was unable to hire a qualified and appropriate expert* ....

"....

"*The trial court's failure to provide funds for a qualified expert(s)* violated Mr. Hinton's right to present a defense, ... and his right under *Ake* to competent, state-funded expert testimony...."

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

"

"[29] Although Ala.Code § 15–12–21(d) (1975) previously limited expert fees to $500, Act No. 84–793, 1984 Ala. Acts 1st Ex.Sess., p. 198, effective June 13, 1984, amended that section to provide reimbursement to appointed counsel for any expenses reasonably incurred in the defense of his/her client, 'to be approved in advance by the trial court.'

(C.R. 1278–85) (emphasis added).

Clearly, the focus of the appellant's claim in his post-hearing brief was that the blame for the limit on funding for an expert was on the trial court rather than on trial counsel. As he argued, trial counsel repeatedly informed the trial court that the funding for an expert was not sufficient, and trial counsel made it clear to the trial court that he needed more funds. However, he concluded that trial counsel's hands were tied because the trial court simply did not provide for any additional funds for an expert.

[21][22] To the extent the appellant may intend for this to be a separate ineffective-assistance claim, it is not properly before this court because he did not first present it to the circuit court. *See Morrison v. State*, 551 So.2d 435 (Ala.Crim.App.1989). To the extent he may intend for it to support his claim that trial counsel rendered ineffective assistance because he allegedly did not present a competent ballistics expert, it is not properly before this court because it is not consistent with the arguments he presented to the circuit court. *See Davis v. State*, 720 So.2d 1006, 1029–30 (Ala.Crim.App.1998) (noting that a party may not assume inconsistent positions before the circuit court and on appeal).

Moreover, even if the appellant's argument were properly before this court, it is without merit. We have reviewed Payne's trial testimony, and we note that he testified in detail about his extensive experience with firearms and toolmarks; the identification of striations and lands and grooves; how rifling is created; how bullets travel when shot; his extensive use of comparison microscopes; various ways toolmarks can be obscured or obliterated, including by corrosive primers; his examination of the bullets and revolver in this case; and his conclusion that the bullets had not been fired from the revolver that was recovered from the appellant's mother.[FN12] We also note that defense counsel thoroughly and extensively cross-examined the State's firearm and toolmark experts and that Payne apparently prepared him for that cross-examination. We further note that, even though Payne did not test-fire the revolver, he examined the bullets the State's experts test-fired. Therefore, unlike the appellant's Rule 32 experts, Payne examined the same test bullets the State's experts examined. Finally, we note that Payne's testimony was more favorable to the defense than that of the appellant's Rule 32 experts because he testified *unequivocally* that the Davidson, Vason, and Smotherman bullets had not been fired from the revolver that was recovered from the appellant's mother.[FN13] Thus, even assuming that counsel's apparent ignorance that the cap on expert expenses had been lifted constituted deficient performance, for the reasons set forth herein, the appellant has not shown that he was prejudiced by that deficient performance. *See Strickland*, supra.

*32 For these reasons, we conclude that the appellant has not satisfied his burden of pleading and proof under Rules 32.3 and 32.6(b), Ala. R.Crim. P., and *Strickland*, supra, and that, therefore, he is not entitled to relief on this claim.

C.

Third, the appellant contends that counsel did not investigate and present evidence that would have established his innocence.

1.

[23] The appellant asserts that counsel did not

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

discover and present evidence that undermined the State's time line for the Quincy's robbery. Specifically, he alleges that counsel should have presented the testimony of Robert Stephenson and LaTonya Herron about the varying times at which employees left Quincy's. However, he did not raise this specific ineffective-assistance-of-counsel claim in any of his petitions or during the evidentiary hearing. Rather, he raises it for the first time on appeal. Therefore, it is not properly before this court. *See Morrison v. State*, 551 So.2d 435 (Ala.Crim.App.1989).

Moreover, for the reasons set forth in Part I.B.1. of this opinion, the appellant has not shown that the presentation of such evidence would probably have changed the outcome of his trial. Although he has made bare allegations, he has not supported them with facts and evidence to show that counsel rendered ineffective assistance in this regard. Therefore, he has not satisfied his burden of pleading and proof pursuant to Rules 32.6(b) and 32.3, Ala. R.Crim. P., and *Strickland*. Accordingly, he is not entitled to relief on this claim.

2.

[24] The appellant also asserts that counsel did not establish that Clark Hayes misidentified him and that law enforcement officers coerced a witness. Specifically, he alleges that Stephenson and Herron would have testified that they were in the Food World with Hayes and did not see the appellant. In its order on the petition, the circuit court found as follows:

"Hinton alleges that his trial counsel was ineffective for failing to adequately investigate whether other Quincy's employees at Food World with Mr. Smotherman and Clark Hayes on the night of the robbery could have established that the robber was not Hinton and that Hayes's identification of Hinton was not credible....

"....

"... At the evidentiary hearing, Hinton presented the testimony of former Quincy's employees Robert Stephenson and Latonya Herron. Both Stephenson and Herron testified that they were at Food World on the night of the Smotherman robbery and that they did not see Hinton there; however, they testified that he did not see anyone strange there that night. (R. 151–152, 168) In addition, Herron also testified that she did not see Mr. Smotherman there, even though it was well-established that Mr. Smotherman was there that night. (R. 172) This testimony does little to discredit the testimony of Clark Hayes because they did not testify that they saw the same suspicious person that Clark Hayes saw, but that it was not Hinton; rather, their testimony was that they did not see anyone suspicious at the Food World that night and that they did not see Hinton. Thus, presentation of this evidence would have had little effect on the verdict and Hinton's trial counsel was not ineffective for not presenting this evidence....

***33** "... Hinton also failed to present evidence about whether or not his trial counsel did investigate these additional witnesses and, rather, made a strategic decision not to present their testimony. *See Boyd v. State*, 746 So.2d 364, 375 (Ala.Crim.App.1999) ('Strategic choices made after a thorough investigation of relevant law and facts are virtually unchallengeable.'). Trial counsel was not questioned about this choice and thus the record is silent; thus, this Court cannot presume error from a silent record and must presume that counsel acted reasonably. Accordingly, this claim is dismissed because Hinton did not meet his burden of proof. *See Dobyne v. State*, 805 So.2d 733, 753 (Ala.Crim.App.2000) (Petitioner failed to meet burden of proving the facts that would entitle him to relief under Rule 32.3 because petitioner presented no evidence in support of his claim.)."

(C.R. 1558–61.) The record supports the circuit

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

court's findings, and we adopt them as part of this opinion. Therefore, the appellant is not entitled to relief on this claim.

The appellant also alleges that counsel rendered ineffective assistance because he did not introduce evidence that Herron thought that Hayes was "slow"; that officers tried to coerce Stephenson to say that he saw the appellant at Food World; and that Quincy's personnel ostracized Stephenson because he did not identify the appellant. (Appellant's brief at p. 80.) However, he did not raise this specific ineffective-assistance-of-counsel claim in any of his petitions or during the evidentiary hearing. Rather, he raised it for the first time in his post-hearing brief. Therefore, we question whether it is properly before this court. *See* *Morrison v. State*, 551 So.2d 435 (Ala.Crim.App.1989).

Moreover, the appellant has not shown that not presenting such evidence constituted deficient performance and that such allegedly deficient performance prejudiced him. Rather, he has simply made bare allegations that he has not supported with facts or evidence. Therefore, he has not satisfied his burden of pleading and proof under Rules 32.6(b) and 32.3, Ala. R.Crim. P., and *Strickland*. Accordingly, he is not entitled to relief in this regard.

[25] The appellant further asserts that counsel did not show that Smotherman's identification of him and of his vehicle was not credible. Specifically, he alleges that counsel should have introduced evidence that Smotherman initially mistook Perry for the appellant; that he misidentified Perry's vehicle; and that he referred to the perpetrators as "they." (Appellant's brief at p. 82.) For the reasons set forth in Part I.B.2.a. of this opinion, the appellant has not shown that the presentation of such evidence would probably have changed the outcome of his trial. Although he has made bare allegations, he has not supported them with facts and evidence to show that counsel rendered ineffective assistance in this regard. Therefore, he has not satisfied his burden of pleading and proof pursuant to Rules 32.3 and 32.6(b), Ala. R.Crim. P., and *Strickland*. Accordingly, he is not entitled to relief on this claim.

4.

***34** [26] In addition, the appellant asserts that counsel did not present documentary evidence to show that he did not have a vehicle that matched the description Smotherman gave. In its order on the petition, the circuit court found as follows:

> "Hinton alleges that his trial counsel was ineffective for failing to present evidence proving that his car had been repossessed and, thus, that Hinton did not own a car matching the description given by Mr. Smotherman. ... At trial, Hinton testified that he had owned a 1975 Chevrolet Caprice, that it was repossessed in April 1985 by Colonial Bank, and that he did not drive the car again after it was repossessed. (T.R. 1492–1495) Therefore, any additional evidence of records proving this car had been repossessed prior to the Quincy's robbery would be cumulative. Accordingly, Hinton has not met his burden of proving that his trial counsel was deficient for failing to investigate and uncover records relating to the repossession of his car because those records would be merely cumulative to evidence already presented to the jury. *See* *Dobyne v. State*, 805 So.2d 733, 755–756 (Ala.Crim.App.2000) (Defendant failed to prove that trial counsel was ineffective for failure to investigate when the additional evidence was cumulative to that evidence presented at trial.); *Boyd v. State*, 746 So.2d 364, 375 (Ala.Crim.App.1999) ('Strategic choices made after a thorough investigation of relevant law and facts are virtually unchallengeable.'). Accordingly, this claim is dismissed."

(C.R. 1550–51.) The record supports the circuit court's findings, and we adopt them as part of this opinion. Therefore, the appellant is not entitled to

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

--- So.2d ---, 2006 WL 1125605 (Ala.Crim.App.)
(Cite as: 2006 WL 1125605 (Ala.Crim.App.))

relief on this claim.

5.

[27] Finally, the appellant asserts that counsel did not present evidence that the trip from the warehouse where he was working to Quincy's would have taken twenty to twenty-three minutes. In its order on the petition, the circuit court found as follows:

> "Hinton alleges that his trial counsel was ineffective for failing to obtain expert assistance to establish that he could not have driven between his job site and the Quincy's in the time required under the State's theory of the case....
>
> "....
>
> "... Hinton conceded at the evidentiary hearing that his trial counsel presented 'a very, very powerful alibi' at the trial; therefore, his trial counsel was not ineffective for not presenting this type of alibi testimony. (R. 56) In addition, Officer K.D. Goodwin testified that it would take approximately 17 minutes to drive from the Bruno's warehouse to Quincy's. (T.R. 1022–1025) Thus, Hinton's trial counsel had the opportunity to ... call a rebuttal witness; however, he chose not to do this. *See Boyd v. State*, 746 So.2d 364, 375 (Ala.Crim.App.1999) ('Strategic choices made after a thorough investigation of relevant law and facts are virtually unchallengeable.'). Therefore, this claim is dismissed."

(C.R. 1568–70.) The record supports the circuit court's findings, and we adopt them as part of this opinion. We also note that trial counsel questioned Goodwin extensively about various routes between the warehouse and Quincy's and how long the drive would take. The appellant has not shown that his counsel's performance was deficient and that he was prejudiced by that deficient performance. Therefore, he is not entitled to relief on this claim.

*35 The appellant also asserts that counsel did not interview witnesses Johnny Hall and Charlie Turner, who would have testified that he could not have left the Bruno's warehouse without being detected. However, we have reviewed the trial testimony and the proffer regarding Hall's and Turner's testimony, and we conclude that Hall's and Turner's testimony would have simply been cumulative to evidence that counsel covered extensively at trial. Therefore, the appellant has not shown that his counsel's performance was deficient and that he was prejudiced by that deficient performance. Accordingly, he is not entitled to relief on this claim.

D.

Fourth, the appellant contends that counsel rendered ineffective assistance during both phases of his trial.

1.

[28] First, the appellant asserts that counsel did not present, in support of his motion to suppress Smotherman's out-of-court identification, evidence that the identification was tainted by Smotherman's conversations with Reginald Payne White, that Smotherman did not describe an obvious scar on his nose, and that Smotherman gave inconsistent descriptions of the perpetrator's vehicle. In his amended petition, he made only the following bare allegations:

> "Trial counsel failed to adequately support the motion for suppression of the identification of Mr. Hinton based on the unduly suggestive photo-lineup, the circumstances of Smotherman's identification, and the inconsistencies in Smotherman's description of the suspect's vehicle."

(C.R. 422.) Also, the appellant did not present any evidence to support this claim during the evidentiary hearing.

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

[29] In its order on the petition, the circuit court found as follows:

"Hinton alleges that his trial counsel was ineffective for failing 'to adequately support the motion for suppression of the identification of Mr. Hinton based on the unduly suggestive photo-lineup, the circumstances of Smotherman's identification, and the inconsistencies in Smotherman's description of the suspect's vehicle.' (Third Amended Petition at paragraph 52) ...

"....

"... 'Trial counsel is not ineffective for having an objection overruled or a motion denied.' *Boyd v. State*, 746 So.2d 364, 402 (Ala.Crim.App.1999)....

"... [T]his claim is dismissed in accordance with Alabama Rule of Criminal Procedure 32.3 because Hinton fails to allege what additional evidence or arguments that could have been offered in support of the motion to suppress in order to prove that his counsel's performance was deficient. *See Boyd v. State*, 746 So.2d 364, 375 (Ala.Crim.App.1999) ('Strategic choices made after a thorough investigation of relevant law and facts are virtually unchallengeable.'). Accordingly, this claim is dismissed."

(C.R. 1565–68.) The record supports the circuit court's findings, and we adopt them as part of this opinion.

Although the appellant provides a few more specific allegations in his post-hearing brief and in his brief to this court, " ' "[t]his court is bound by the record and not by allegations or arguments in brief reciting matters not disclosed by the record." *Moore v. State*, 457 So.2d 981, 989 (Ala.Cr.App.1984), cert. denied, 470 U.S. 1053, 105 S.Ct. 1757, 84 L.Ed.2d 820 (1985).' *Garnett v. State*, 555 So.2d 1153 (Ala.Crim.App.1989)." *Similton v. State*, 672 So.2d 1363, 1366 (Ala.Crim.App.1995). For the reasons set forth herein, the appellant has not satisfied his burden of pleading and proof as to this claim. *See* Rules 32.3 and 32.6(b), Ala. R.Crim. P. Therefore, he is not entitled to relief on this claim.

2.

***36** [30] Second, the appellant alleges that counsel did not adequately investigate and present evidence that the real killer telephoned his home, his mother, and his attorney to confess to the offenses for which he was being tried. In its order on the petition, the circuit court found as follows:

"Hinton alleges that his trial counsel was ineffective for failing to present evidence regarding phone calls received by trial counsel, counsel's secretary, and Hinton's mother from a person claiming responsibility for the Davidson/Vason murders.... Trial counsel presented the testimony of Julia Self, his office manager, who testified out of the presence of the jury that she received a phone call at the office from a person who identified himself as Gerald Washington. (T.R. 1555–1560) According to Ms. Self, the caller told her that someone had called Parkway Church of Christ and claimed responsibility for the murders for which Hinton was being tried. (T.R. 1556) Trial counsel subsequently explained to the trial court how he had tried to follow up on this phone call and he told the court about a similar call he received at home. (T.R. 1561–1567) Trial counsel had a duty to reasonably investigate a defendant's case, but counsel is not required to 'discover every shred of evidence':

" 'While counsel has a duty to investigate in an attempt to locate evidence favorable to the defendant, "this duty only requires a reasonable investigation." *Singleton v. Thigpen*, 847 F.2d 668, 669 (11th Cir.(Ala.) 1988), *cert. denied*, 488 U.S. 1019, 109 S.Ct. 822, 102 L.Ed.2d 812 (1989) (emphasis added). *See Strickland*, 466 U.S. at

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

691, 104 S.Ct. at 2066; *Morrison v. State*, 551 So.2d 435 (Ala.Cr.App.1989), *cert. denied*, 495 U.S. 911, 110 S.Ct. 1938, 109 L.Ed.2d 301 (1990). Counsel's obligation is to conduct a "substantial investigation into each of the plausible lines of defense." *Strickland*, 466 U.S. at 681, 104 S.Ct. at 2061 (emphasis added). "A substantial investigation is just what the term implies; it does not demand that counsel discover every shred of evidence but that a reasonable inquiry into all plausible defenses be made." *Id.*, 466 U.S. at 686, 104 S.Ct. at 2063.

" ' "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information." *Id.*, 466 U.S. at 691, 104 S.Ct. at 2066.' *Jones v. State*, 753 So.2d at 1191."

" *Dobyne v. State*, 805 So.2d 733, 754 (Ala.Crim.App.2000). Accordingly, the record at trial proves that trial counsel reasonably investigated this lead regarding a caller claiming responsibility for the crimes for which Hinton was convicted and, thus, trial counsel was not ineffective. *See Thomas v. State*, 766 So.2d 860, 886–889 (Ala.Crim.App.1998) (Defense counsel was not ineffective for failing to conduct adequate investigation of anonymous caller because counsel attempted to ascertain the validity of the information, the caller's testimony would have been inadmissible hearsay, and there was strong evidence that defendant committed the crimes.); *see also Dobyne v. State*, 805 So.2d 733, 755–756 (Ala.Crim.App.2000) (Defendant failed to prove that trial counsel was ineffective for failure to investigate when the additional evidence was cumulative to that evidence presented at trial.)....

*37 "... Hinton did not meet his burden of proving the facts that would entitle him to relief under Alabama Rule of Criminal Procedure 32.3. *See Dobyne v. State*, 805 So.2d 733, 753 (Ala.Crim.App.2000) (Petitioner failed to meet burden of proving the facts that would entitle him to relief under Rule 32.3 because petitioner presented no evidence in support of his claim.). Hinton presented no evidence proving that this mystery caller could have been found or what he/she would have testified to if found. Thus, this claim is dismissed."

(C.R. 1552–55.) The record supports the circuit court's findings, and we adopt them as part of this opinion. Therefore, the appellant is not entitled to relief on this claim.

3.

Third, the appellant alleges that counsel did not investigate or present evidence that crimes with the same modus operandi continued after he was arrested. In its order on the petition, the circuit court found as follows:

"Hinton alleges that his trial counsel was ineffective for failing to investigate and present evidence of other crimes with a similar *modus operandi* that were committed after he was arrested....

"....

"... Trial counsel's performance was not deficient because he did present evidence that other similar crimes occurred after Hinton's arrest. At trial, Hinton presented the testimony of Birmingham Police Investigator James Chambliss, who testified that crimes similar to the Davidson and Vason murders occurred after Hinton was arrested and that no one had been apprehended for those crimes. (T.R. 1311–1320) Therefore, this claim is dismissed because Hinton failed to prove that his trial counsel

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

was ineffective. *See Strickland v. Washington*, 466 U.S. at 687. For this same reason, this claim is dismissed in accordance with Alabama Rule of Criminal Procedure 32.3 because Hinton fails to meet his burden of proving the facts necessary to entitle him to relief."

(C.R. 1563–65.) The record supports the circuit court's findings, and we adopt them as part of this opinion. Therefore, the appellant is not entitled to relief on this claim.

4.

[31][32][33][34][35] Fourth, the appellant alleges that counsel did not make a *Batson* [FN14] objection at trial and on appeal on the basis of racial discrimination. In its order on the petition, the circuit court found as follows:

"Hinton alleges that his trial counsel was ineffective for failing to make a *Batson* motion. This claim is dismissed for the following reasons:

"... Hinton alleges that his trial counsel was ineffective for failing to make a *Batson* motion; however, Hinton bears the burden of proving that counsel was ineffective for failing to make a *Batson* motion:

"To prevail on a claim of ineffective assistance of counsel based upon an attorney's failure to make a *Batson* motion, a defendant must show that there was a prima facie case of 'purposeful discrimination by the State in the jury selection process.' *[Ex parte] Yelder*, 575 So.2d [137], 138 [(Ala.1991)]. If the record does not show a prima facie case of purposeful discrimination, then an appellate court will not assume that the defendant's attorney was ineffective in not making a *Batson* motion. *See, e.g., Patrick v. State*, 680 So.2d 959, 962 (Ala.Crim.App.1996). Rather, there is 'a strong presumption that counsel's conduct was appropriate and reasonable.' *Id.* at 961.

***38** " *Ex parte Frazier*, 758 So.2d 611, 616 (Ala.1999). Where a prima facie case may have existed, but the record did not reflect it because counsel did not record the race and gender of the veniremembers, the defendant still bears the burden of presenting evidence to prove the prima facie case because error cannot be predicated on a silent record. *See id.*

"In his petition, Hinton alleges only that the State used nine of its peremptory challenges to remove African–Americans from the venire. The Alabama appellate courts have consistently held that a *Batson* motion based strictly on the number of African–American venire members stricken from the jury is not sufficient to prove a prima facie case of racial discrimination. *See Ex parte Pressley*, 770 So.2d 143, 147 (Ala.2000); *Harrell v. State*, 555 So.2d at 268 ('The defendant must offer some evidence in addition to the striking of blacks that would raise the inference of discrimination.'); *Ex parte Trawick*, 698 So.2d 162, 168 (Ala.1997) ('Without more, we do not find that the number of strikes this prosecutor used to remove women from the venire is sufficient to establish a prima facie case of gender discrimination.'); *McElemore v. State*, [798 So.2d 693] (Ala.Crim.App.2000) ('It is important that the defendant come forward with facts, not just numbers alone, when asking the trial court to find a prima facie case of racial discrimination.'); *Powell v. State*, 796 So.2d 404, 431 (Ala.Crim.App.1999), *aff'd*, 796 So.2d 434 (Ala.2001) ('A defendant fails to establish a prima facie case of discrimination under *Batson* and *Ex parte Branch* where the defendant fails to show any evidence of discrimination other that the number of African–American venire members who were struck.'); *Hall v. State*, [820 So.2d 113] (Ala.Crim.App.1999) ('Without more, we do not find that the number of strikes this prosecutor used to remove [blacks] from the venire is

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

sufficient to establish a prima facie case of discrimination.'); *Dinkins v. State*, 701 So.2d 302, 303 (Ala.Crim.App.1995) ('Merely showing that the challenged party struck one or more members of a particular race is not sufficient to establish a prima facie case.').

"Because Hinton fails to allege or prove disparate treatment in the State's use of its peremptory challenges, as required by *Ex parte Branch*, 526 So.2d 609, 622, 623 (Ala.1987), Hinton has not properly alleged nor proved that his trial counsel was ineffective for not making a *Batson* motion. Rather, it is presumed that 'counsel's conduct was appropriate and reasonable.' *Ex parte Frazier*, 758 So.2d 611, 616 (Ala.1999). Indeed, counsel indicated that it was pleased with the jury selected at trial. (T.R. 388) ...

"... [T]his claim is dismissed in accordance with Alabama Rule of Criminal Procedure 32.3 because Hinton fails to meet his burden of proving the facts necessary to entitle him to relief. Hinton presented absolutely no evidence of the veniremembers' race, disparate treatment, or of how the State used its peremptory strikes. *See Dobyne v. State*, 805 So.2d 733, 753 (Ala.Crim.App.2000) (Petitioner who presented no evidence in support of claim did not meet his burden of pleading and proving by a preponderance of the evidence facts that would entitle him to relief under Rule 32.3.). Thus, this claim is dismissed.

***39** "[Also], this claim is dismissed for lack of specificity in accordance with Alabama Rule of Criminal Procedure 32.6(b) because Hinton fails to allege facts necessary to show that counsel could have proved a prima facie case in support of a *Batson* motion. The only specific allegation offered in support of what counsel could have stated in a *Batson* motion is that the State removed nine of the fourteen African-American veniremembers; however, Hinton presents no evidence in support of this allegation. Even so, a *Batson* motion based solely on the number of African-Americans removed from the venire will not prove a prima facie case of discrimination. *See Ex parte Pressley*, 770 So.2d 143, 147 (Ala.2000). Though Hinton alleges disparate treatment during the venire as an additional factor, *Ex parte Branch* places the burden of proving additional facts and circumstances raising an inference of racial discrimination on the petitioner; thus, a vague allegation of disparate treatment without specific examples does not satisfy Hinton's burden of pleading with specificity as required by Rule 32.6(b). *See Ex parte Branch*, 526 So.2d 609, 622 (Ala.1987). In addition, counsel was not questioned about this and the record is silent on this matter; thus, this court must presume that counsel acted reasonably. Thus, this claim is dismissed."

(C.R. 1570–75.) The record supports the circuit court's findings, and we adopt them as part of this opinion. Therefore, the appellant is not entitled to relief on this claim.

5.

[36] Fifth, the appellant alleges that counsel did not secure a transcript of critical portions of the proceedings, including bench conferences and portions of the jury selection proceedings. In his amended petition, he made only the following bare allegations:

"Trial counsel's conduct constituted ineffective assistance of counsel when he failed to secure transcription of critical portions of the proceedings, thereby failing to properly preserve the record for review on appeal. There was no strategic basis for trial counsel to not ensure a complete transcript of the jury selection process was preserved. The failure of trial counsel to ensure that all aspects of Mr. Hinton's trial were transcribed, and especially, trial counsel's failure to ensure that the record contained information relevant to jury selection and the composition of the jury pool, prevented Mr. Hinton from receiving a full review of his case and has

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

precluded him from adequately litigating such claims as the improper denial of strikes for cause and improper elimination of African-American veniremembers by the prosecution. *Dobbs v. Zant*, 506 U.S. 357 (1993).

"....

"... Trial counsel did not adequately preserve the record by failing to have transcribed critical sections of the trial including the bench conferences and parts of the jury selection. (*See, e.g.*, R. 445–446, 490, 505–506, 575, 582, 598, 600–601, 612, 615, 715–716, 739, 752, 773, 939–940, 966, 970, 997, 1031, 1036, 1054, 1058, 1069, 1151, 1218, 1232, 1234, 1337, 1366, 1454, 1486, 1536, 1537, 1554, 1570, 1668, 1705, 1708, 1896.) The failure of defense counsel to preserve this information for the record restricted Mr. Hinton's ability to raise meritorious issues on appeal."

***40** (C.R. 424–26.) Also, during the evidentiary hearing, the appellant did not present any evidence to support this claim.

In its order on the petition, the circuit court found as follows:

"Hinton alleges that his trial counsel was ineffective for failing to have portions of the jury selection and bench conferences transcribed. This claim is dismissed for the following reasons:

"... In *Boyd v. State*, 746 So.2d 364, 381–382 (Ala.Crim.App.1999), a Rule 32 petitioner similarly claimed that his trial counsel was ineffective for not having part of the voir dire and bench conferences transcribed; the Alabama Court of Criminal Appeals noted that 'a court reporter has never been required to transcribe bench conferences or to record the striking of the jury unless requested to do so.' *Id.* at 381–382 (citing *Ex parte Harris*, 632 So.2d 543 (Ala.1993), *aff'd*, 513 U.S. 504 (1995)).[4] Because the defendant only made speculative allegations about how he was prejudiced by his trial counsel not having the jury selection transcribed, the Court found that this claim was properly dismissed under Alabama Rule of Criminal Procedure 32.3 for failing to meet his burden of proof and under Alabama Rule of Criminal Procedure 32.6 as a bare allegation. *Id.* at 382. Similarly, Hinton only made speculative allegations as to how he may have been prejudiced without offering any evidence as to how he was actually prejudiced. Accordingly, this claim is dismissed because Hinton has not proved that his counsel was ineffective.

"[Also], this claim dismissed for lack specificity in accordance with Alabama Rule of Criminal Procedure 32.6(b) because Hinton fails to specifically allege how he was prejudiced by the omission of portions of the jury selection from the record. Hinton only makes a general allegation of prejudice without specific examples.

"

"[4] At the time of Hinton's trial in 1986, there was no requirement that voir dire be transcribed. Alabama Rule of Criminal Procedure 19.4(a) required court reporters to transcribe voir dire examination of the jury and it did not become effective until January 1, 1991. *See Boyd v. State*, 746 So.2d at 382."

(C.R. 1584–86.) The record supports the circuit court's findings, and we adopt them as part of this opinion. Therefore, the appellant is not entitled to relief on this claim.

6.

[37] Sixth, the appellant alleges that counsel did not ask the trial court to instruct on the lesser offense of felony murder. In his petition, he made only the following bare allegations:

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

"Trial counsel failed to request any special jury instructions, including, but not limited to, failing to ask that the jury be instructed on lesser included offenses of robbery murder, as Mr. Hinton was entitled to have them instructed. Felony murder during the course of a robbery is a lesser crime than capital murder under Alabama law. *See Womack v. State*, 435 So.2d 754, 763 (Ala.Crim.App.), *aff'd*, 435 So.2d 766 (Ala.1983), *cert. denied*, 464 U.S. 986 (1983) (the trial court properly instructed the jury as to the 'intent to kill requirement' by instructing the jury that the felony murder doctrine was relevant only as a lesser included offense of noncapital murder, and that the jury could not convict the defendant for capital murder without finding beyond a reasonable doubt that he had possessed the intent to kill); *Ex parte Jackson*, 674 So.2d 1365, 1367–68 (Ala.1994) (instruction on felony murder as a lesser included offense of the offense of murder committed during the course of a robbery was proper). Had counsel requested a lesser included offense instruction on felony murder, Mr. Hinton's jury would not have been restricted to a choice between conviction for a capital offense and acquittal. In *Beck v. Alabama*, this Court held that 'a sentence of death [may not] constitutionally be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict.' *Beck v. Alabama*, 447 U.S. 625, 627 (1980)."

***41** (C.R. 424–25.) Also, he did not present any evidence to support this claim during the evidentiary hearing.

[38] In its order on the petition, the circuit court found as follows:

"Hinton alleges that his trial counsel was ineffective for failing to request a jury instruction on the lesser included offense of felony robbery-murder. This claim is dismissed for the following reasons:

"... Defendants are entitled to jury instructions on lesser-included offenses; however, defendants are not entitled to jury instructions on lesser-included offenses where there is no evidence to support such a charge. *See Beck v. Alabama*, 447 U.S. 625, 638 (1980); *Hopper v. Evans*, 456 U.S. 605, 611 (1982); *Hodges v. State*, [856 So.2d 875] (Ala.Crim.App.2001).

"The Alabama Supreme Court reviewed a similar claim in *Ex parte Stork*, 475 So.2d 623 (Ala.1985), where it considered ... 'whether a defendant is entitled to a jury charge on a lesser-included offense when he denies committing the crime itself.' *Dorsey v. State*, [881 So.2d 460, 514] (Ala.Crim.App.2001). Though the courts have traditionally found it proper to deny a request for a jury instruction when the requested instruction is inconsistent with the defense, the Court found that a defendant's claim of innocence is not a bar to a jury instruction on a lesser-included offense. *Id.* at [514]. Instead, the Court found that there must be evidence to support the lesser-included offense before the defendant is entitled to the jury instruction. *Id.* at [515]. In this case, there is no evidence that the murders of Thomas Vason and John Davidson were anything but intentional; therefore, there was no evidence in the record to support a jury instruction for the lesser-included offense of felony murder. Thus, Hinton would not have been entitled to a jury instruction on a lesser included offense even if his counsel had requested it....

"[Also], this claim is dismissed for lack of specificity in accordance with Alabama Rule of Criminal Procedure 32.6(b). Hinton makes a broad allegation that his trial counsel was ineffective for failing to request a jury instruction on the lesser-included offense of felony murder; however, he fails to allege the factual basis necessary to prove that the murder

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

of John Davidson and Thomas Vason were committed in such a way as to support a jury instruction on a lesser included offense. Even if Hinton had been entitled to such a jury instruction, he failed to question trial counsel about why he chose not to request it; thus, with a silent record, the Court must presume that trial counsel acted reasonably. Without doing so, Hinton fails to allege a factual basis that would entitle him to relief if proved true."

(C.R. 1580–82.) The record supports the circuit court's findings, and we adopt them as part of this opinion. Therefore, the appellant is not entitled to relief on this claim.

7.

[39] Seventh, the appellant asserts that counsel did not object to misconduct by the prosecutor. In its order on the petition, the circuit court found as follows:

***42** "Hinton alleges that his trial counsel was ineffective for failing to object to numerous instances of improper conduct by the prosecutor. This claim is dismissed for the following reasons:

"... In this claim, Hinton alleges that trial counsel was ineffective for failing to object to the prosecutorial misconduct of statements made during the trial. While Hinton points to certain statements made during trial and nothing more, Hinton has not proved that the outcome of his trial would have been different without those statements. Without such a showing, Hinton fails to prove that these alleged statements prejudiced him and that, thus, his trial counsel was ineffective for not objecting. *See* Boyd v. State, 746 So.2d 364, 375 (Ala.Crim.App.1999) ('Strategic choices made after a thorough investigation of relevant law and facts are virtually unchallengeable.')....

"... [T]his claim is dismissed for lack of specificity in accordance with Alabama Rule of Criminal Procedure 32.6(b). Hinton makes broad allegations that his trial counsel was ineffective for failing to object to alleged instances of prosecutorial misconduct; however, he fails to allege the factual basis necessary to prove that these incidents prejudiced the outcome of his trial. In addition, Hinton failed to question his counsel regarding the alleged incidents of prosecutorial misconduct; thus, the record is silent and this Court must presume that counsel acted reasonably. *See* Thomas v. State, [824 So.2d 1, 24] (Ala.Crim.App.1999) ('[T]he failure to object should be weighed as part of our evaluation of the comments, because the failure to object may suggest that the defense did not consider the comments to be particularly harmful.'). Without doing so, Hinton fails to allege the factual basis necessary to show how he is entitled to relief."

(C.R. 1582–84.) The record supports the circuit court's findings, and we adopt them as part of this opinion. Therefore, the appellant is not entitled to relief on this claim.

8.

[40] Eighth, the appellant asserts that counsel did not identify jurors who would automatically sentence him to death and did not conduct adequate voir dire examination to determine whether veniremembers were biased or should otherwise be struck for cause. In his amended petition, he made only the following bare allegations:

"Trial counsel failed to adequately examine jurors to identify those who would, based on a capital conviction, automatically sentence Mr. Hinton to death in violation of his constitutionally protected rights and voir dire potential jurors in any way to effectively discern if they would be biased or should otherwise be struck for cause."

(C.R. 426.) Also, he did not present any evidence

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

to support this claim during the evidentiary hearing.

In its order on the petition, the circuit court found as follows:

"Hinton alleges that his trial counsel was ineffective for failing to adequately examine jurors to determine those who would automatically sentence him to death if he were convicted of capital murder. This claim is dismissed for the following reasons:

***43** "... The trial court conducted voir dire and asked the veniremembers if any of them had fixed opinions regarding the imposition of the death penalty and the following veniremembers indicated a fixed opinion towards the death penalty: V.C., L.H., A.H., V.H., S.H., T.L., C.M., B.O., and B.W. (T.R. 111–113, 226–228) The trial court then questioned these veniremembers about this during individual voir dire. (T.R. 234–235, 244–248, 254–255, 264–267, 275–285, 297–300) As a result, veniremembers C.M. and L.H. were removed for cause because they could not vote for the death penalty under any circumstances and T.L. was removed for cause because he would only vote for the death penalty if Hinton were convicted of capital murder.[5] (T.R. 286, 247, 282) The remaining veniremembers indicated that they would not automatically vote for the death penalty if Hinton were convicted of capital murder. (T.R. 234–235, 264–267, 297–300) Hinton fails to allege or prove what his trial counsel could have done differently or how he was prejudiced. *See Boyd v. State*, 746 So.2d 364, 375 (Ala.Crim.App.1999) ('Strategic choices made after a thorough investigation of relevant law and facts are virtually unchallengeable.')....

"... [T]his claim is dismissed for lack of specificity in accordance with Alabama Rule of Criminal Procedure 32.6(b) because Hinton fails to specifically allege the factual basis that, if proved true, would warrant post-conviction relief because he does not allege how counsel's performance was deficient or how he was prejudiced in regard to death-qualifying the jury. *See Williams v. State*, 783 So.2d 108, 130 (Ala.Crim.App.2000) (Trial court correctly dismissed petitioner's claim that his trial counsel was ineffective for not adequately questioning veniremembers about whether they would automatically vote to impose the death penalty because he did not meet the specificity requirements of Rule 32.6(b) or burden of proof under Rule 32.3.); *See also Callahan v. State*, 767 So.2d 380, 389 (Ala.Crim.App.1999). In addition, Hinton failed to make any showing of prejudice. Accordingly, this claim is dismissed.

"

"[5] Veniremembers A.H., V.H., and B.W. were removed for cause due to family concerns. (R. 253, 259, 326)"

(C.R. 1586–88.) The record supports the circuit court's findings, and we adopt them as part of this opinion. Therefore, the appellant is not entitled to relief on this claim.

9.

[41][42][43] Ninth, the appellant alleges that counsel

"conducted no investigation, prepared no strategy, presented no evidence other than Mr. Hinton's unprepared statement, and utterly failed to advocate for Mr. Hinton at the life-or-death stage of his capital trial. Counsel conducted not a single mitigation interview and failed to obtain information regarding Mr. Hinton's family and social history, educational history, medical history, mental health history, correctional history, and any community or cultural influences. Counsel called no witnesses and presented no documentary or other evidence at the penalty phase. Mr. Hinton exercised his right to

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

testify and made a brief unprepared statement to the jury without counsel's involvement. (R. 1876–77.) Trial counsel's penalty phase advocacy consisted entirely of a four-sentence opening statement and two-sentence closing statement. The entire penalty phase—from the State's opening through the State's rebuttal closing—encompasses only nine transcript pages. (R. 1871–79.)

***44** "Likewise, counsel offered no defense against the imposition of the death penalty at the sentencing hearing before the judge. Even after the jury recommended death, counsel did nothing to convince the court to spare Mr. Hinton's life. Counsel did not even talk with Mr. Hinton before the sentencing hearing about whether he should testify. In fact, counsel told the sentencing judge that he had no idea what Mr. Hinton was going to say. (R. 1917.)"

(Appellant's brief at pp. 92–93.) In its order on the petition, the circuit court found as follows:

"Hinton alleges that his trial counsel was ineffective for failing to call any other witnesses in mitigation for the penalty phase. This claim is dismissed for the following reasons:

"First, this claim is dismissed under Alabama Rule of Criminal Procedure 32.3 because Hinton fails to plead or prove the facts necessary to entitle him to relief. Hinton did not allege who trial counsel could have called or to what those witnesses would have testified. *See Callahan v. State*, 767 So.2d 380, 388–389 (Ala.Crim.App.1999) (Bare allegations that trial counsel was ineffective were due to be dismissed under Rule 32.3 because petitioner did not allege the facts necessary to entitle him to relief.). Moreover, Hinton presented no evidence of witnesses who could have testified for mitigation purposes at his trial. *See Dobyne v. State*, 805 So.2d 733, 753 (Ala.Crim.App.2000) (Petitioner failed to meet burden of proving the facts necessary to entitle him to relief under Rule 32.3 because the petitioner presented no evidence in support of his claim.). Therefore, this claim is dismissed.

"... In addition, Hinton fails to allege how this was a deficient trial strategy that prejudiced the outcome of his verdict. *See Boyd v. State*, 746 So.2d 364, 375 (Ala.Crim.App.1999)('Strategic choices made after a thorough investigation of relevant law and facts are virtually unchallengeable.')....

"[Also], this claim is dismissed for lack of specificity in accordance with Alabama Rule of Criminal Procedure 32.6(b) because Hinton fails to specifically allege the factual basis that, if proved true, would warrant post-conviction relief. Hinton had not alleged how his counsel's performance was deficient or how he was prejudiced by his counsel not calling additional witnesses to testify in mitigation; he merely asserts that this is per se ineffectiveness. Hinton did not meet his burden of pleading with specificity because he did not allege who counsel could have called and to what these witnesses would have testified. Hinton failed to meet his burden of proof, as well. Therefore, this claim is dismissed.

"... Hinton alleges that his trial counsel was ineffective for failing to obtain complete and accurate information regarding his 'family and social history, educational history, medical history, mental health history, correctional history, and any community and cultural influences.' ...

***45** "....

"... [T]his claim is dismissed under Alabama Rule of Criminal Procedure 32.3 because Hinton fails to plead or prove the facts necessary to entitle him to relief. Hinton did not allege what specific records trial counsel could have presented or what those documents would have testified in mitigation. *See Callahan v. State*, 767 So.2d 380, 388–389 (Ala.Crim.App.1999) (Bare allegations that trial

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

counsel was ineffective were due to be dismissed under Rule 32.3 because petitioner did not allege the facts necessary to entitle him to relief.). Moreover, Hinton presented no evidence of records that could have been used for mitigation purposes at his trial. *See Dobyne v. State*, 805 So.2d 733, 753 (Ala.Crim.App.2000) (Petitioner failed to meet burden of proving the facts necessary to entitle him to relief under Rule 32.3 because the petitioner presented no evidence in support of his claim.). Therefore, this claim is dismissed.

"....

"[Also], this claim is dismissed for lack of specificity in accordance with Alabama Rule of Criminal Procedure 32.6(b) because Hinton fails to allege a factual basis that, if proved true, would warrant postconviction relief. Hinton does not allege how counsel's performance was deficient by alleging what evidence in mitigation could have been presented and he does not specifically allege how he was prejudiced. Accordingly, this claim is dismissed as a bare allegation.

"... Hinton alleges that his trial counsel was ineffective for failing to prepare a penalty phase strategy and effectively make a case for saving his life. This claim is dismissed for the following reasons:

"First, this claim is dismissed under Alabama Rule of Criminal Procedure 32.3 because Hinton fails to plead or prove the facts necessary to entitle him to relief. Hinton did not allege what other mitigation strategy would have been effective or what evidence could have been presented in support of another mitigation strategy. *See Callahan v. State*, 767 So.2d 380, 388–389 (Ala.Crim.App.1999) (Bare allegations that trial counsel was ineffective were due to be dismissed under Rule 32.3 because petitioner did not allege the facts necessary to entitle him to relief.). Moreover, Hinton presented no evidence of what could have been presented in a different mitigation strategy at his trial. *See Dobyne v. State*, 805 So.2d 733, 753 (Ala.Crim.App.2000) (Petitioner failed to meet burden of proving the facts necessary to entitle him to relief under Rule 32.3 because the petitioner presented no evidence in support of his claim.). Therefore, this claim is dismissed.

"... The record clearly shows that throughout the trial and penalty phase, the defense theory was innocence because Hinton and counsel maintained his innocence throughout the proceedings. Hinton has not alleged nor offered any evidence to prove how his trial counsel's performance was deficient or how he was prejudiced by it....

***46** "[Also], this claim is dismissed for lack of specificity in accordance with Alabama Rule of Criminal Procedure 32.6(b) because Hinton fails to specifically allege the factual basis that, if proved true, would warrant post-conviction relief. Hinton had not alleged how his counsel's performance was deficient or how he was prejudiced by his counsel's choice in defense strategy. Instead, Hinton merely asserts that his counsel was ineffective because the jury chose not to believe it. In addition, Hinton has not met his burden of proof under Rule 32.3. Therefore, this claim is dismissed because Hinton has not met his burden of pleading with specificity or his burden of proof.

"... Hinton alleges that his trial counsel was ineffective for failing to investigate or present mitigating evidence and mitigating witnesses. This claim is dismissed for the following reasons:

"First, this claim is dismissed under Alabama Rule of Criminal Procedure 32.3 because Hinton fails to plead or prove the facts necessary to entitle him to relief. Hinton did not allege what other witnesses or evidence could have been presented in

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

mitigation at the trial. *See* Callahan v. State, 767 So.2d 380, 388–389 (Ala.Crim.App.1999) (Bare allegations that trial counsel was ineffective were due to be dismissed under Rule 32.3 because petitioner did not allege the facts necessary to entitle him to relief.). Moreover, Hinton presented no evidence of what could have been presented in mitigation at his trial. *See* Dobyne v. State, 805 So.2d 733, 753 (Ala.Crim.App.2000) (Petitioner failed to meet burden of proving the facts necessary to entitle him to relief under Rule 32.3 because the petitioner presented no evidence in support of his claim.). Therefore, this claim is dismissed.

"....

"[Also], this claim is dismissed for lack of specificity in accordance with Alabama Rule of Criminal Procedure 32.6(b) because Hinton fails to specifically allege the factual basis that, if proved true, would warrant post-conviction relief. Hinton has not alleged how his counsel's performance was deficient or how he was prejudiced by his counsel's choice in defense strategy. Instead, Hinton offers only a bare allegation and, thus, he has not met his burden of pleading with specificity as required by Rule 32.6(b). Thus, this claim is dismissed.

"... Hinton alleges that his trial counsel was ineffective for failing to consult or communicate with him before his testimony in the penalty phase....

"... Hinton alleges that his trial counsel was ineffective for not communicating with him prior to testifying at the sentencing hearing and he bases this argument on the contention that 'Counsel stated before the judge and jury that he "had no idea what Mr. Hinton was going to say." ' (Paragraph 66 of Petitioner's third amended petition) The actual statement made by counsel is as follows:

" 'Judge, let me make aware to the Court that Mr. Hinton has requested the opportunity to testify. *I have no particular idea of the subject matter of testimony so there's no way of questioning him.* I don't see how it could make any difference if he just testifies in narrative. They have whatever opportunity they want to talk to him. I don't know the subject matter.'

*47 "(T.R. 1917–1918) Because this statement was made at the sentencing hearing, this statement has no bearing on trial counsel's communication with Hinton prior to his testimony before the jury during the penalty phase. In fact, Hinton testified before the jury during the penalty phase and it was not in narrative form. (T.R. 1876–1877) Accordingly, the record does not support his contention that counsel did not advise Hinton about his testimony before the jury; instead, it appears that counsel gave Hinton the opportunity to speak on his own behalf at the sentencing hearing. *See* Boyd v. State, 746 So.2d 364, 375 (Ala.Crim.App.1999) ('Strategic choices made after a thorough investigation of relevant law and facts are virtually unchallengeable.'). Hinton fails to allege how counsel's performance was deficient or how he was prejudiced. Accordingly, this claim is dismissed.

"Second, this claim is dismissed for lack of specificity in accordance with Alabama Rule of Criminal Procedure 32.6(b) because Hinton fails to allege a factual basis that, if proved true, would warrant postconviction relief. Hinton does not allege how counsel's performance was deficient by allowing him to speak freely to the trial court about his sentence and he does not specifically allege how he was prejudiced. Accordingly, this claim is dismissed as a bare allegation. In addition, Hinton failed to meet his burden of proof under Rule 32.3. Hinton did not question trial counsel regarding this issue and, thus, the record is silent. This Court cannot predicate error on a silent record, thus, this claim is dismissed."

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

(R. 1589–1602.) The record supports the circuit court's findings, and we adopt them as part of this opinion. Therefore, the appellant is not entitled to relief in this regard.

10.

[44] Tenth, the appellant alleges that counsel did not object to testimony by two bailiffs that he said that he knew how to beat a lie detector test. In its order on the petition, the circuit court found as follows:

"Hinton alleges that his trial counsel was ineffective for failing to object to the State presenting testimony at the sentencing hearing from two bailiffs about ... Hinton saying that he knew how to beat a polygraph. This claim is dismissed for the following reasons:

"... Hinton argues that his trial counsel was ineffective [for not] objecting to the State presenting the testimony of two bailiffs at the sentencing hearing because this testimony impermissibly influenced the jury's sentence recommendation. This jury recommended death at the end of the penalty phase in the trial on pages 1900–1901 of the trial record; however, the two bailiffs testified before the judge only after the penalty phase at the sentencing hearing on pages 1909–1916 of the trial record. Therefore, it was not possible for this testimony to have influenced the jury's recommendation in any way because the jury had already rendered its sentencing recommendation and the jury had been released. In addition, Hinton 'opened the door' to this testimony because he had testified during the penalty phase that he had passed the polygraph. (T.R. 1877) Therefore, his counsel cannot be deficient for not objecting to testimony that is admissible. *See* Boyd v. State, 746 So.2d 364, 375 (Ala.Crim.App.1999) ('Strategic choices made after a thorough investigation of relevant law and facts are virtually unchallengeable.')....

***48** "... [T]his claim is dismissed for lack of specificity in accordance with Alabama Rule of Criminal Procedure 32.6(b) because Hinton fails to allege a factual basis that, if proved true, would warrant post-conviction relief. Hinton first alleges facts that can be directly refuted by the record because the testimony that he alleges as impermissibl[y] influencing the jury was not presented to the jury. In addition, Hinton does not allege how counsel was deficient not for objecting to evidence that is admissible. Accordingly, this claim is dismissed as a bare allegation."

(C.R. 1602–04.) The record supports the circuit court's findings, and we adopt them as part of this opinion. Therefore, the appellant is not entitled to relief on this claim.

11.

[45] Eleventh, the appellant alleges that counsel did not object to the instruction that aggravating circumstances should be deemed proven based on findings made during the guilt phase of the trial. In its order on the petition, the circuit court found as follows:

"Hinton alleges that his trial counsel was ineffective for failing to object to the presumption at the penalty phase that any aggravating circumstances proven beyond a reasonable doubt during the guilt/innocence phase were proved beyond a reasonable doubt at the penalty phase. This claim is dismissed for the following reasons:

"... Section 13A–5–43(e) of the 1975 *Code of Alabama* provides the following:

" 'At the sentencing hearing the state shall have the burden of proving beyond a reasonable doubt the existence of any aggravating circumstances. Provided, however, any aggravating circumstances which the verdict convicting the defend-

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

ant establishes was proven beyond a reasonable doubt at trial shall be considered as proved beyond a reasonable doubt for purposes of the sentencing hearing.'

"Trial counsel can not be deficient for failing to object to something that is established by statute. *See* Boyd v. State, 746 So.2d 364, 375 (Ala.Crim.App.1999) ('Strategic choices made after a thorough investigation of relevant law and facts are virtually unchallengeable.')....

"... [T]his claim is dismissed for lack of specificity in accordance with Alabama Rule of Criminal Procedure 32.6(b) because Hinton failed to specifically allege the factual basis that, if proved true, would warrant post-conviction relief. Thus, this claim is dismissed."

(C.R. 1604–05.) The record supports the circuit court's findings, and we adopt them as part of this opinion. Therefore, the appellant is not entitled to relief on this claim.

12.

[46][47][48][49][50][51] Twelfth, the appellant alleges that

"[c]ounsel failed to provide effective assistance on appeal because he did not raise the State's discriminatory use of peremptory challenges and the denial of funds necessary to protect Mr. Hinton's rights, *see* United States ex rel. Erickson v. Shomig, 162 F.Supp.2d 1020, 1042–49 (N.D.Ill.2001), failed to move to supplement the record to show the racial composition of the venire and the race of each venireperson struck by the prosecution, did not consult or communicate with Mr. Hinton in preparation of his appeal, and denied Mr. Hinton his rights guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the state laws and constitution of Alabama."

*49 (Appellant's brief at pp. 93–94.) In its order on the petition, the circuit court found as follows:

"Hinton alleges that his counsel was ineffective on appeal for not raising an alleged *Batson* violation and for not consulting him prior to filing his appeal. This claim is dismissed for the following reasons:

"... Though Hinton alleges that his counsel was ineffective for not consulting with him prior to filing his appeal, he does not allege how counsel's performance was deficient or how he was prejudiced. Hinton also did not offer proof of this allegation. Hinton also alleges that his trial counsel was ineffective for failing to argue a *Batson* violation on appeal. To prove that counsel was ineffective on appeal, Hinton must prove that the outcome of his appeal would have been different but for counsel's deficient performance. *See* Jones v. State, [816 So.2d 1067, 1071] (Ala.Crim.App.2000) (The standard for ineffective assistance of appellate counsel is the same as the standard for ineffective assistance of trial counsel.). To do this in relation to a *Batson* violation on appeal, Hinton bears the burden of proving that counsel could have made a prima facie case of discrimination for a *Batson* motion:

" 'To prevail on a claim of ineffective assistance of counsel based upon an attorney's failure to make a *Batson* motion, a defendant must show that there was a prima facie case of "purposeful discrimination by the State in the jury selection process." [*Ex parte*] Yelder, 575 So.2d [137], 138 [(Ala.1991)]. If the record does not show a prima facie case of purposeful discrimination, then an appellate court will not assume that the defendant's attorney was ineffective in not making a *Batson* motion. *See, e.g.*, Patrick v. State, 680 So.2d 959, 962 (Ala.Crim.App.1996). Rather, there is "a strong presumption that counsel's conduct was appropriate and reasonable." *Id.* at 961.'

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

" *Ex parte Frazier*, 758 So.2d 611, 616 (Ala.1999). Where a prima facie case may have existed, but the record did not reflect it because counsel did not record the race and gender of the veniremembers, the defendant still bears the burden of presenting evidence to prove the prima facie case because error cannot be predicated on a silent record. *See Id.* Hinton does not allege the facts necessary to prove a prima facie case of discrimination under *Batson v. Kentucky*, 476 U.S. 79 (1986); thus, he fails to state a claim showing how his counsel's performance was deficient on appeal and, thus, constituted ineffective assistance. Because Hinton has not alleged the facts necessary to prove a prima facie case of purposeful discrimination, it must be assumed that his counsel's performance was not deficient. *See id.* Therefore, Hinton has not satisfied the deficient performance requirement of proving ineffective assistance of counsel. Also, counsel indicated that it was pleased with the jury selected at trial. (R. 388) *See Boyd v. State*, 746 So.2d 364, 375 (Ala.Crim.App.1999) ('Strategic choices made after a thorough investigation of relevant law and facts are virtually unchallengeable.').

***50** "... [T]his claim is dismissed in accordance with Alabama Rule of Criminal Procedure 32.3 because Hinton fails to meet his burden of proving the facts necessary to entitle him to relief. Hinton fails to allege disparate treatment of the veniremembers. *See Callahan v. State*, 767 So.2d 380, 388–389 (Ala.Crim.App.1999) (Bare allegations that trial counsel was ineffective were due to be dismissed under Rule 32.3 because petitioner did not allege the facts necessary to entitle him to relief.). Moreover, Hinton presented no evidence of African–American veniremembers being removed due to race or disparate treatment of the veniremembers. *See Dobyne v. State*, 805 So.2d 733, 753 (Ala.Crim.App.2000) (Petitioner failed to meet burden of proving the facts necessary to entitle him to relief under Rule 32.3 because the petitioner presented no evidence in support of his claim.). Therefore, this claim is dismissed.

"[Also], this claim is dismissed for lack of specificity in accordance with Alabama Rule of Criminal Procedure 32.6(b) because Hinton fails to allege a factual basis that, if proved true, would warrant post-conviction relief. Hinton does not allege the facts to show how his counsel was deficient or how his counsel prejudiced him by not consulting him before filing an appeal. Hinton also fails to allege the facts necessary to show how his counsel was deficient in not arguing a *Batson* violation on appeal. The only specific allegation offered in support of what counsel could have stated in a *Batson* motion is that the State removed nine of the fourteen African–American veniremembers. A *Batson* motion based solely on the number of African–Americans removed from the venire will not prove a prima facie case of discrimination. *See Ex parte Pressley*, 770 So.2d 143, 147 (Ala.2000). Though Hinton alleges disparate treatment during the venire as an additional factor, *Ex parte Branch* places the burden of proving additional facts and circumstances raising an inference of racial discrimination on the petitioner; thus, a vague allegation of disparate treatment without specific examples does not satisfy Hinton's burden of pleading with specificity as required by Rule 32.6(b). *See Ex parte Branch*, 526 So.2d 609, 622 (Ala.1987).

"... Hinton alleges that his trial counsel was ineffective for failing to supplement the record on appeal to note the racial composition of the jury or the race and gender of those removed through peremptory challenges....

"....

"... To prove that counsel was ineffective on appeal, Hinton must prove that the outcome of his appeal would have been different but for counsel's

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

deficient performance. *See Jones v. State*, [816 So.2d 1067, 1071] (Ala.Crim.App.2000) (The standard for ineffective assistance of appellate counsel is the same as the standard for ineffective assistance of trial counsel.). 'Failure to make a record of the race or gender of persons against whom the prosecution asserted peremptory strikes not per se ineffective assistance of counsel; it would constitute ineffective assistance only if a prima facie case of purposeful discrimination existed.' *Ex parte Frazier*, 758 So.2d 611, 616 (Ala.1999) (citing *Ex parte Yelder*, 575 So.2d 137, 139 (Ala.1991)). Therefore, Hinton must prove that a prima facie case of discrimination existed in his jury selection before he can prove that his trial counsel was ineffective for failing to supplement the record to note the race of the veniremembers against whom the State exercised its peremptory strikes. As discussed above, Hinton has not alleged facts necessary to prove a prima facie case of racial discrimination. Accordingly, Hinton fails to state a claim showing how he was prejudiced by his counsel's decision not to note the racial and gender composition of the jury or removed veniremembers because he has not presented facts necessary to prove a prima facie case for a *Batson* motion.

***51** "[Also], this claim is dismissed for lack of specificity in accordance with Alabama Rule of Criminal Procedure 32.6(b) because Hinton fails to allege facts proving that a prima facie case of discrimination existed in order to prove that his appellate counsel was ineffective for not supplementing the record to note the race and gender of the veniremembers. *See Ex parte Frazier*, 758 So.2d 611, 616 (Ala.1999). In addition, Hinton failed to question his counsel regarding this issue and the record is silent; accordingly, Hinton fails to meet his burden of proof because this Court must presume that counsel acted reasonably when the record is silent on the matter. Therefore, this claim is dismissed."

(C.R. 1608–16.) The record supports the circuit court's findings, and we adopt them as part of this opinion.[FN15]

E.

Fifth, the appellant contends that the circuit court erred in dismissing some of his claims as failing to state a claim upon which relief can be granted because there is no material issue of law or fact. Specifically, he contends that ineffective assistance of counsel is a claim and that summary dismissal pursuant to Rule 32.7(d), Ala. R.Crim. P., is moot once a circuit court has conducted an evidentiary hearing. For the reasons set forth herein, the circuit court correctly found that the appellant was not entitled to relief on his ineffective-assistance-of-counsel claims. Because we may affirm a circuit court's denial of a Rule 32 petition if it is correct for any reason, *see Sumlin v. State*, 710 So.2d 941 (Ala.Crim.App.1998), we need not address this argument.

F.

Sixth, the appellant contends that the circuit court erred in dismissing some of his ineffective-assistance claims as time-barred based on *Charest v. State*, 854 So.2d 1102 (Ala.Crim.App.2002). In *Ex parte Jenkins*, [Ms. 1031313, April 8, 2005] --- So.2d --- (Ala.2005), the Alabama Supreme Court overruled this Court's decision in *Charest* and stated:

"Given the direction in the Alabama Rules of Criminal Procedure that amendments to Rule 32 petitions are to be allowed at any time before the trial court enters a judgment, Rule 32.7(b), and that leave to amend is to be freely granted, Rule 32.7(d), we conclude that a restriction on a Rule 32 petitioner's right to file an amendment by applying principles found in the Alabama Rules of Civil Procedure, such as the relation-back doctrine, should be the subject of careful consideration by the Standing Committee on the Alabama Rules of Criminal Procedure. We decline to rewrite the Rules of Criminal Procedure by sanctioning the incorpo-

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

ration of the relation-back doctrine into those rules when nothing of that nature presently appears in them.

"To the extent that the following cases applied the relation-back doctrine to proceedings governed by Rule 32, Ala. R.Crim. P., we overrule those cases: *Harris v. State*, [Ms. CR–01–1748, October 29, 2004] ---- So.2d ---- (Ala.Crim.App.2004); *McWilliams v. State*, 897 So.2d 437 (Ala.Crim.App.2004); *Giles v. State*, 906 So.2d 963 (Ala.Crim.App.2004); *Ex parte Mack*, 894 So.2d 764 (Ala.Crim.App.2003); *DeBruce v. State*, 890 So.2d 1068 (Ala.Crim.App.2003); *Charest v. State*, 854 So.2d 1102 (Ala.Crim.App.2002); and *Garrett v. State*, 644 So.2d 977 (Ala.Crim.App.1994)."

972 So.2d at ---- (footnote omitted).

***52** [52] Initially, we note that the circuit court entered its order on January 18, 2005, which was before *Jenkins* was decided. Also, this court may affirm a circuit court's denial of a Rule 32 petition if it is correct for any reason. *See Sumlin v. State*, 710 So.2d 941 (Ala.Crim.App.1998). For the reasons set forth herein, the circuit court correctly found that the appellant was not entitled to relief on his ineffective-assistance-of-counsel claims. Therefore, even though the circuit court's reliance on *Charest* is no longer valid, reversal is not required.

G.

Finally, the appellant contends that "[t]he cumulative effect of counsel's underfunded, deficient and prejudicial performance during the guilt/innocence, penalty, and appellate phases denied [him] adequate representation, due process and a fair trial." (Appellant's brief at p. 95.) However, for these reasons set forth herein, the appellant has not established, individually or cumulatively, that he is entitled to relief on his ineffective-assistance-of-counsel claims. Therefore, this argument is without merit.

IV.

The appellant's fourth argument is that he is entitled to a new trial because the State lost or destroyed evidence.

A.

[53][54] The appellant contends that the Bessemer Police Department lost a daytimer page on which Smotherman wrote a description of his assailant immediately after he was shot. In its order on the petition, the circuit court found as follows:

"Hinton alleges that the State lost or destroyed exculpatory evidence regarding Smotherman's identification of Hinton. Specifically, Hinton alleges that the page from Smotherman's daytimer, where Smotherman wrote his description of Hinton immediately after the robbery, was lost by Bessemer police and never given to Hinton for examination. Sidney Smotherman testified about writing this description in his daytimer before escaping from the Quincy's food locker and that he gave that sheet of paper to a Bessemer police officer. (T.R. 885–886) This claim is precluded under Alabama Rule of Criminal Procedure 32.2(a)(3) because this could have been, but was not, raised in a pretrial motion or at trial. Where claims raised under *Brady v. Maryland*, 373 U.S. 83 (1963), are not based upon newly discovered evidence, the procedural bars of Rule 32.2(a) apply. *See Williams v. State*, 782 So.2d 811, 818 (Ala.Crim.App.2000); *Bui v. State*, 717 So.2d 6, 27 (Ala.Crim.App.1997). Accordingly, he is precluded from post-conviction relief on this claim under Rule 32.2(a)(3). *See Bearden v. State*, [825 So.2d 868, 871] (Ala.Crim.App.2001); *Dobyne v. State*, 805 So.2d 733, 762 (Ala.Crim.App.2000); *Daniels v. State*, 650 So.2d 544, 551 (Ala.Crim.App.), *cert. denied*, 650 So.2d 544 (Ala.1994), *cert. denied*, 115 S.Ct. 1375 (1995); *Russ v. State*, 640 So.2d 21, 22 (Ala.Crim.App.1994).

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

"Also, this claim is precluded under Alabama Rule of Criminal Procedure 32.2(a)(5) because this could have been, but was not, raised on appeal. Hinton did not raise this issue on appeal. *See Hinton v. State*, 548 So.2d 547 (Ala.Crim.App.1988). Therefore, this issue is precluded from post-conviction relief because it could have been, but was not, raised on appeal. *See Ex parte Sanders*, 792 So.2d 1087, 1090–91 (Ala.2001); *Avery v. State*, [832 So.2d 664, 665] (Ala.Crim.App.2001); *Daniels v. State*, 650 So.2d 544, 551 (Ala.Crim.App.), *cert. denied*, 650 So.2d 544 (Ala.1994), *cert. denied*, 115 S.Ct. 1375 (1995); *Jackson v. State*, 612 So.2d 1356, 1357 (Ala.Crim.App.1992)."

***53** (C.R. 1632–34.) The record supports the circuit court's findings, and we adopt them as part of this opinion. We further note that trial counsel repeatedly questioned witnesses about the daytimer page and the fact that it had been lost. Therefore, the appellant is not entitled to relief on this claim.

B.

[55] The appellant contends that the State returned Smotherman's vehicle and key to him without testing them for fingerprints. In its order on the petition, the circuit court found as follows:

"Hinton alleges that the State destroyed possible exculpatory evidence by returning the car to Smotherman without testing the car for fingerprints. The State did test the car for fingerprints and presented testimony at trial that there were no usable latent prints found in Smotherman's car and that, thus, Hinton's fingerprints were not found in the car. (T.R. 1133–1135) Therefore, this claim is dismissed in accordance with Alabama Rule of Criminal Procedure 32.3 for failure to plead and prove the facts necessary to entitle him to relief.

"In addition, this claim is precluded under Alabama Rule of Criminal Procedure 32.2(a)(3) because this could have been, but was not, raised in a pretrial motion or at trial. Where claims raised under *Brady v. Maryland*, 373 U.S. 83 (1963), are not based upon newly discovered evidence, the procedural bars of Rule 32.2(a) apply. *See Williams v. State*, 782 So.2d 811, 818 (Ala.Crim.App.2000); *Bui v. State*, 717 So.2d 6, 27 (Ala.Crim.App.1997). The facts surrounding the fingerprint testing of Smotherman's car were presented at trial and this claim is not based upon any newly discovered evidence. (T.R. 1133–1135) Accordingly, he is precluded from post-conviction relief on this claim under Rule 32.2(a)(3). *See Bearden v. State*, [825 So.2d 868, 871] (Ala.Crim.App.2001); *Dobyne v. State*, 805 So.2d 733, 762 (Ala.Crim.App.2000); *Daniels v. State*, 650 So.2d 544, 551 (Ala.Crim.App.), *cert. denied*, 650 So.2d 544 (Ala.1994), *cert. denied*, 115 S.Ct. 1375 (1995); *Russ v. State*, 640 So.2d 21, 22 (Ala.Crim.App.1994).

"Also, this claim is precluded under Alabama Rule of Criminal Procedure 32.2(a)(5) because this could have been, but was not, raised on appeal. Hinton did not raise this issue on appeal. *See Hinton v. State*, 548 So.2d 547 (Ala.Crim.App.1988). Therefore, this issue is precluded from post-conviction relief because it could have been, but was not, raised on appeal. *See Ex parte Sanders*, 792 So.2d 1087, 1090–91 (Ala.2001); *Avery v. State*, [832 So.2d 664, 665] (Ala.Crim.App.2001); *Daniels v. State*, 650 So.2d 544, 551 (Ala.Crim.App.), *cert. denied*, 650 So.2d 544 (Ala.1994), *cert. denied*, 115 S.Ct. 1375 (1995); *Jackson v. State*, 612 So.2d 1356, 1357 (Ala.Crim.App.1992)."

(C.R. 1630–32.) The record supports the circuit court's findings, and we adopt them as part of this opinion. We further note that trial counsel also elicited testimony about Smotherman's key being returned to

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

him without having been tested. Therefore, the appellant is not entitled to relief on this claim.

V.

***54** [56] The appellant's fifth argument is that the absence of any independent judicial review or adjudication of the issues requires that this court grant relief. Specifically, he contends that the circuit court improperly adopted the State's proposed order.

> " 'While the practice of adopting the State's proposed findings of fact and conclusions of law is subject to criticism, the general rule is that even when the court adopts proposed findings and conclusions verbatim, the findings are those of the court and may be reversed only if clearly erroneous. *Anderson v. City of Bessemer, N.C.*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985); *Hubbard v. State*, 584 So.2d 895 (Ala.Cr.App.1991); *Weeks v. State*, 568 So.2d 864 (Ala.Cr.App.1989), cert. denied, 498 U.S. 882, 111 S.Ct. 230, 112 L.Ed.2d 184 (1990); *Morrison v. State*, 551 So.2d 435 (Ala.Cr.App.1989), cert. denied, 495 U.S. 911, 110 S.Ct. 1938, 109 L.Ed.2d 301 (1990).'
>
> " *Wright v. State*, 593 So.2d 111, 117–18 (Ala.Cr.App.1991), cert. denied, [506] U.S. [844], 113 S.Ct. 132, 121 L.Ed.2d 86 (1992)."
>
> *Holladay v. State*, 629 So.2d 673, 687–88 (Ala.Crim.App.1992).

Initially, we note that the circuit court gave both parties the option of submitting proposed orders. Further, the record does not indicate that the circuit court's decision to deny the petition was clearly erroneous. We do note that the circuit court's reliance on *Charest*, supra, is no longer valid, as set forth in Part III.F. of this opinion. However, the circuit court also gave additional or alternative grounds for denying the appellant's claims. For the reasons set forth in this opinion, the circuit court properly denied the appellant's petition. Therefore, even if some of the circuit court's reasons were incorrect, reversal is not required. *See* *Sumlin v. State*, 710 So.2d 941 (Ala.Crim.App.1998) (holding that we will affirm a circuit court's denial of a Rule 32 petition if it is correct for any reason).

VI.

[57] The appellant's sixth argument is that the failure to provide the defense with competent expert assistance entitles him to relief. This claim is precluded because he could have raised it at trial and on direct appeal, but did not. *See* Rule 32.2(a)(3) and (5), Ala. R.Crim. P.

VII.

[58] The appellant's seventh argument is that he was not afforded a fair review in the circuit court. Specifically, he contends that the circuit court erred in ruling that any evidence related to his alibi on the night of the Quincy's robbery was barred because he raised an alibi defense at trial. During the evidentiary hearing, the circuit court repeatedly explained that the appellant's alibi had been covered very thoroughly at trial and that, therefore, any additional testimony about his alibi would simply be cumulative to testimony presented at trial. Moreover, the appellant's Rule 32 attorney conceded that the case "was based on an identification that was rebutted by what we believe to be a very, very powerful alibi." (R. 56.) Finally, we have reviewed both the trial testimony and the appellant's evidentiary hearing proffer regarding his alibi, and we conclude that the evidence he proffered was covered thoroughly and extensively at trial. Because the alibi evidence would simply have been cumulative to evidence presented at trial, the circuit court properly excluded it. *See* Rule 32.1(e)(2), Ala. R.Crim. P.

VIII.

***55** The appellant's eighth argument is that he is entitled to relief on his remaining claims.

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

A.

[59] First, the appellant contends that the trial court erred when it consolidated two separate capital murder indictments for trial. This claim is precluded because it was raised and addressed at trial and on direct appeal. *See* Rule 32.2(a)(2) and (4), Ala. R.Crim. P.

B.

[60] Second, the appellant contends that the trial court erred when it excluded polygraph evidence that would have exonerated him. This claim is precluded because it was raised and addressed at trial and on direct appeal. *See* Rule 32.2(a)(2) and (4), Ala. R.Crim. P.

C.

[61] Third, the appellant contends that the State's loss of the test bullets requires a new trial. This claim is precluded because it was raised and addressed on direct appeal. *See* Rule 32.2(a)(4), Ala. R.Crim. P.

D.

[62] Fourth, the appellant contends that the trial court improperly allowed the State's experts to testify based on evidence—test bullets—that was not admitted at trial. This claim is precluded because it was raised and addressed on direct appeal. *See* Rule 32.2(a)(4), Ala. R.Crim. P.

E.

Fifth, the appellant contends that the trial court improperly admitted evidence about the Smotherman offense. This claim is precluded pursuant to the provisions of Rule 32.2(a), Ala. R.Crim. P.

F.

Sixth, the appellant contends that the prosecutor's misconduct violated his rights. This claim is precluded pursuant to the provisions of Rule 32.2(a), Ala. R.Crim. P.

G.

[63] Seventh, the appellant contends that his convictions and sentences are unconstitutional pursuant to *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). However, the decision in *Ring* does not apply retroactively to cases pending on collateral review. *See Schriro v. Summerlin*, 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004); *Boyd v. State*, 913 So.2d 1113 (Ala.Crim.App.2003). Therefore, the appellant's argument is without merit.

H.

[64] Eighth, the appellant contends that "[l]ethal injection results in the unnecessary and gratuitous infliction of pain in violation of the Eighth Amendment." (Appellant's brief at p. 117.) This argument is not properly before this court because he raises it for the first time on appeal.[FN10] *See Morrison*, supra.

I.

Ninth, the appellant contends that he was deprived of the effective assistance of counsel based on the trial court's denial of funds for a proper ballistics expert. In its order on the petition, the circuit court found as follows:

"To succeed in proving an ineffective assistance of counsel claim, the petitioner must prove that his counsel's performance was deficient and that the outcome of his trial was prejudiced as a result. *See Strickland v. Washington*, 466 U.S. 668 (1984). As discussed above, Hinton has not alleged how he was prejudiced by the testimony of his ballistics expert at trial. In addition, the trial court gave Hinton leave to ask for funds in excess of the $1,000 already granted for a ballistics expert. (T.R. 10) This claim is completely without merit, however, because ineffective assistance of counsel is viewed from the actions of counsel and not the actions of the trial court. Hinton is stating a claim for a due process violation under the Fourteenth Amendment; how-

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

ever, this alleged due process violation is procedurally barred as it could have been, but was not, raised at trial. *Cf. Bui v. State*, 717 So.2d 6, 27 (Ala.Crim.App.1997)."

***56** (C.R. 1643–44.) The record supports the circuit court's findings, and we adopt them as part of this opinion.

Moreover, as set forth previously in this opinion, Payne gave very thorough testimony regarding his qualifications, the functioning of firearms, and toolmark identification. He also testified unequivocally that the Davidson, Vason, and Smotherman bullets had not been fired from the revolver that was recovered from the appellant's mother. Finally, he apparently assisted trial counsel so that he could extensively cross-examine the State's firearm and toolmark experts. In contrast, as set forth above, the testimony of the appellant's Rule 32 experts was not as favorable as Payne's unequivocal testimony. Therefore, the appellant has not established that he was denied the effective assistance of counsel in this regard. Accordingly, he is not entitled to relief on this claim.

For the above-stated reasons, the circuit court properly denied the appellant's petition. Accordingly, we affirm the circuit court's judgment.

AFFIRMED.

McMILLAN, P.J., concurs.
WISE, J., concurs specially, with opinion.
COBB and SHAW, JJ., dissent, both with opinion.

WISE, Judge, concurring specially.

I concur with the main opinion's affirmance of the circuit court's denial of Hinton's Rule 32 petition. I write specially to express my concerns with regard to several aspects of this case.

Hinton's Rule 32 petition was filed in the circuit court on August 15, 1990. However, the circuit court did not enter its ruling on Hinton's petition until January 18, 2005. This delay of almost 15 years was based in part on delays caused by Hinton's amending his Rule 32 petition several times. Rule 32.7(b), Ala.R.Crim.P., provides that "[a]mendments to pleadings may be permitted at any stage of the proceedings prior to the entry of judgment." Likewise, Rule 32.7(d), Ala.R.Crim.P., states that "[l]eave to amend shall be freely granted." Addressing the propriety of amendments to Rule 32 petitions, this Court, in *Miles v. State*, 845 So.2d 830 (Ala.Crim.App.2001), stated:

" '[T]he circuit court is within its discretion in refusing to consider [a petitioner's] motion to amend his [Rule 32] petition so long as disallowance of the amendment is "based upon some valid ground, such as actual prejudice or undue delay," *Cochran v. State*, 548 So.2d 1062, 1075 (Ala.Cr.App.), *cert. denied*, 493 U.S. 900, 110 S.Ct. 259, 107 L.Ed.2d 208 (1989). A court may refuse permission to amend where there is no showing of diligence or no showing that the underlying facts were unknown to the petitioner before filing his petition. *Whitehead v. State*, 593 So.2d 126 (Ala.Cr.App.1991); *Cochran*.' "

845 So.2d at 832–33 (quoting *Harper v. State*, 676 So.2d 949, 951 (Ala.Crim.App.1995)). Accord *Makres v. State*, 739 So.2d 1141, 1142 (Ala.Crim.App.1998); *Neelley v. State*, 642 So.2d 494, 497 (Ala.Crim.App.1993).

Even in cases such as this where the ultimate penalty of death has been imposed, there must be a point at which the claims presented to a court are sufficiently settled so as to allow the circuit court to render a decision in a timely fashion. For this reason, I believe that Rule 32.7(b) should be amended to set out the circumstances under which a Rule 32 petition may be amended, as well as to establish a specific time period beyond which amendments to a Rule 32 petition will not be entertained, absent extraordinary cir-

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

cumstances. Such an amendment would clarify the Alabama Supreme Court's intent when it adopted Rule 32.7, Ala.R.Crim.P. Amending Rule 32.7(b) would prevent frivolous amendments to petitions, the consequence of which are unnecessary delays in the resolution of meritorious claims, as well as the creation of yet more problems for an already overburdened and understaffed judicial system.

***57** I also write to express my concerns with regard to the evidence—or lack thereof—presented by the State to rebut Hinton's claim that newly discovered evidence in the form of forensic testing established that the bullets recovered from the three crime scenes could not be linked to a single gun, namely, the revolver officers recovered from Hinton's mother. In support of his claim for postconviction relief, Hinton presented the testimony of Lannie Emanuel, Raymond Cooper, and John H. Dillon, Jr., firearm and toolmark experts. The testimony of these experts called into question the testimony of David Higgins and Lawden Yates, the State's expert witnesses at Hinton's trial, who testified that the bullets from the three crime scenes were fired from the same revolver that was recovered from Hinton's mother.

I concur with the main opinion's conclusion that Hinton was not entitled to relief on this claim. Moreover, I do not mean to suggest that a Rule 32 petitioner should be relieved of the burden of pleading and proving the facts necessary to entitle him to relief, as required by Rule 32.3, Ala.R.Crim.P. I do believe, however, that in cases such as this, where advances in forensic testing or scientific knowledge call into question earlier test results and/or prior expert testimony, the State would be well-advised to present additional evidence to rebut the petitioner's evidence, rather than to "rest on its laurels" and be left to argue that the petitioner failed to meet his burden of proof under Rule 32.3, Ala.R.Crim.P.

Finally, I write to express my concerns regarding the trend of Rule 32 petitioners in raising claims couched in terms of newly discovered evidence that are, in fact, nothing more than an attempt to relitigate a petitioner's entire case. Given that the evidence presented by Hinton did not constitute newly discovered evidence under Rule 32.1(e), Hinton's claim was thus a claim of actual innocence of the capital-murder charges of which he was convicted, coupled with a claim that the State's evidence was insufficient to support his conviction, a claim raised and addressed at trial and on direct appeal. Such a claim was procedurally barred. See, e.g., *Russell v. State*, 886 So.2d 123, 125 (Ala.Crim.App.2003). Although never specifically addressed by this Court, other jurisdictions have expressly recognized that a postconviction proceeding cannot be used as a substitute for a second appeal and will not serve as a forum for relitigating the guilt or innocence of the petitioner. See *Decker v. State*, 623 S.W.2d 563, 565 (Mo.Ct.App.1981).

> " 'The purpose of the post-conviction proceeding is to permit inquiry into constitutional issues involved in the original conviction that have not already been adjudicated or could have been.' *People v. Silagy*, 116 Ill.2d 357, 365, 107 Ill.Dec. 677, 507 N.E.2d 830 (1987). Hence, in a postconviction proceeding, the trial court does not redetermine a defendant's innocence or guilt, but instead examines constitutional issues which escaped earlier review. [*People v.*] *Rogers*, 197 Ill.2d [216,] 221, 258 Ill.Dec. 557, 756 N.E.2d 831 [(2001)]. As such, a petition for postconviction relief is not an appeal of the underlying judgment; rather, it is a collateral proceeding. *Rogers*, 197 Ill.2d at 221, 258 Ill.Dec. 557, 756 N.E.2d 831; [*People v.*] *West*, 187 Ill.2d [418,] 425, 241 Ill.Dec. 535, 719 N.E.2d 664 [(1999)]."

***58** *People v. Blair*, 215 Ill.2d 427, 447, 294 Ill.Dec. 654, 667, 831 N.E.2d 604, 617 (2005).

Absent legitimate claims of relief based on newly discovered evidence, this Court should not allow petitioners to relitigate claims of guilt or innocence in Rule 32 petitions. To allow otherwise overburdens the

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

entire judicial system.

COBB, Judge, dissenting.

I believe Anthony Ray Hinton is entitled to a new trial. At the hearing on his Rule 32, Ala. R.Crim. P., petition, he proved that his attorney was ineffective and that the State of Alabama had violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Postconviction relief in the form of a new trial would be warranted on either ground alone; together, however, they form a powerful pair of reasons that, in my opinion, mandate that a new trial be granted to Hinton. Therefore, I dissent from the main opinion.

I.

Hinton alleged in his Rule 32 petition that his trial counsel provided ineffective assistance because, he argued, counsel presented an unqualified firearms witness to testify on what the parties have always agreed, and continue on appeal to agree, was the crucial evidence—the bullets obtained at the crime scenes and the gun found at Hinton's mother's residence. He alleged that the defense witness "was not qualified to examine and determine projectile matches; his credibility was severely attacked on cross-examination, and exploited by the state in closing." (C. 418.) Hinton further alleged:

> "Counsel was additionally ineffective to not seek additional funds when it became obvious that the individual willing to examine the evidence in the case for the $1,000 allotted by the court was incompetent and unqualified. Indeed, this failure to seek additional, sufficient funds is rendered all the more inexplicable by the trial court's express invitation to counsel to seek more funds if such funds were necessary. [TR. 10–12.][FN17]"

(C. 419.)

In determining that trial counsel's performance was not ineffective, the majority quotes and adopts portions of the circuit court's order.[FN18] The circuit court and the majority have mischaracterized the substance of Hinton's claim and have used that mischaracterization to hold that trial counsel's performance was effective. The majority states, " 'Hinton alleges that his trial counsel was deficient for not presenting any [FN19] evidence that the bullets found at the crime scenes were not fired from the gun found at his mother's house; however, Hinton's counsel did put on such testimony.' " — So.2d at —— (quoting (C. 1547)). The majority summarizes the testimony of Andrew Payne, the defense witness who testified that none of the crime-scene bullets matched the gun recovered from Hinton's mother's house, and concludes that " 'the trial record clearly refutes Hinton's claim that his trial counsel was ineffective for failure to present testimony in rebuttal to the State's ballistics evidence.' " — So.2d at —— (quoting C. 1548). The majority also addresses Hinton's claim that trial counsel was ineffective for failing to seek additional funds to hire a qualified expert witness by stating that Hinton alleged " 'that a qualified ballistics expert would have testified that the bullets fired at the three crime scenes were not fired by the gun recovered at his mother's house,' " and by stating, " 'this is exactly what [Hinton's] ballistics expert testified at trial.' " — So.2d at —— (quoting C. 1549–50).[FN20]

*59 As to both claims, which are interrelated, the majority has avoided the essential arguments Hinton has made about trial counsel—that he was ineffective for presenting *an unqualified expert* at trial and that he was ineffective for failing to seek additional funds to retain *a qualified expert* to testify. As Hinton has clearly alleged, the error was not trial counsel's failure to present an expert to rebut the State's evidence, but his failure to present a *competent* expert. Hinton proved at the Rule 32 hearing that counsel rendered deficient performance and that he suffered prejudice as a result of trial counsel's failure to seek additional funds to retain and present a competent expert to testify about the very evidence that all of the parties agree was crucial to the case. Hinton proved these claims,

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

--- So.2d ----, 2006 WL 1125605 (Ala.Crim.App.)
(Cite as: 2006 WL 1125605 (Ala.Crim.App.))

and the trial court should have granted him a new trial.

A. *Funding for a defense expert*

In January 1986, trial counsel filed a request for approval of extraordinary expenses in each of the capital cases in which he was representing Hinton. (TC. 1997–2000, 2115–18.) [FN21] Counsel stated in the motions that he could not adequately prepare his defense without an opportunity to have an independent expert test the firearm and bullets and that the expert he had contacted quoted a fee of $95 per hour, plus expenses. At the first hearing held in this case, on February 7, 1986, to consider pretrial motions, the trial court granted the motions for funds to hire an expert. The trial court granted up to $500 for each case and stated:

> "*I don't know as to what my limitations are as for how much I can grant*, but I can grant up to $500.00 in each case as far as I know right now and I'm granting up to $500.00 in each of these two cases for this. *So if you need additional experts I would go ahead and file on a separate form and I'll have to see if I can grant additional experts*, but I am granting up to $500.00, which is the statutory maximum as far as I know on this and *if it's necessary that we go beyond that then I may check to see if we can*, but this one's granted."
>
> (TR. 10.)(Emphasis added.)

On March 4, 1986, trial counsel filed a motion to continue the trial because he had been unable to obtain a firearms expert. (TC. 2016–17.) At the June 17, 1986, hearing on the motion, trial counsel acknowledged that the firearms evidence was crucial. He listed the names of several potential witnesses he had contacted and stated that many of them required more than $1,000 for their services. (TR. 63–70.) Trial counsel also made a curious remark: "And I've also spent enough time that I exceeded the allowance limit just in the time I've been looking for a doggone expert." (TR. 62.) Counsel stated that Andrew Payne was his only prospective expert (TR. 62–63) but that he was not certain that Payne was qualified to testify (TR. 69). The record indicates that the trial court had previously suggested that counsel contact Payne; counsel stated that he had initially not contacted Payne because counsel had asked attorneys about Payne and the attorney who was familiar with Payne would not recommend him. (TR. 70–71.) Counsel then told the court, "So now I'm stuck that he's the only guy I could possibly produce." (TR. 71.) Furthermore, when Payne was questioned on cross-examination at trial about his fee, he testified that he was not certain that he would be paid any fee because trial counsel had told him he did not know whether he could pay Payne. (TR. 1656.) When the prosecutor asked Payne whether he would submit a bill, Payne replied that if trial counsel "said that this is a—I hate to use the word charity, but if this is a case in which there are no funds to pay me it would be rather pointless to submit a bill." (TR. 1656.) Payne further testified that he had never discussed his fee with trial counsel; counsel told him that he was not sure he could pay Payne, and Payne said he told counsel "that's all right with me." (TR. 1656.)

***60** Trial counsel testified at the Rule 32 hearing that he did not believe that Payne had the expertise needed in the case and that Payne's trial testimony had not been effective. (R. 188.) Trial counsel also testified that he did not retain any of the several experts he believed would have been qualified to testify because the statute governing fees for experts prevented him from obtaining additional funding to hire one of the qualified experts. (R. 188, 207.)

Hinton alleged that counsel was ineffective because he failed to secure additional funds to hire a competent expert.[FN22] The Rule 32 court and the majority have failed to address this claim; they essentially avoided Hinton's claim by arguing that Payne's testimony was adequate. While that argument fails utterly to persuade, as will be discussed below, the un-

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

derlying argument regarding counsel's failure to seek additional funds has merit, and it should have been addressed.

At the time of Hinton's trial in 1986, § 15–12–21, Ala.Code 1975, addressed the appointment of counsel for indigent defendants. Section 15–12–21(d) contained a limit on attorney fees, but it stated, in relevant part, "Counsel shall also be entitled to be reimbursed for *any expenses reasonably incurred* in such defense to be approved in advance by the trial court." Previous versions of the statute allowed reimbursement of expenses in an amount up to one-half of the attorney's fees, which had a statutory cap of $1,000. *See Smelley v. State*, 564 So.2d 74, 88 (Ala.Crim.App.1990). "This section was amended by Act No. 84–793, 1984 Ala. Acts 1st Ex.Sess., p. 198, § 1, *effective June 13, 1984* ...." *Dubose v. State*, 662 So.2d 1156, 1177 n. 5 (Ala.Crim.App.1993), *aff'd*, 662 So.2d 1189 (Ala.1995) (emphasis added). As Hinton notes in his brief on appeal at page 73 n. 39, the version of the statute in effect at the time of Hinton's trial, which began more than two years after the amendment became effective, contained no specific limit on funds available for experts. Trial counsel's beliefs that he was unable to hire a qualified expert because the statute limited the amount of compensation and that he was "stuck [with Payne because] he's the only guy I could possibly produce" (TR. 71) were incorrect. Trial counsel was limited *only* by his lack of knowledge of the relevant law.

The United States Supreme Court stated that the Sixth Amendment right to counsel means that every attorney "has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (citing *Powell v. Alabama*, 287 U.S. 45, 68–69, 53 S.Ct. 55, 77 L.Ed. 158 (1932)). The *Strickland* court also stated:

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel had a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."

***61** 466 U.S. at 690–91, 104 S.Ct. 2052.

The record of the trial and the record of the Rule 32 proceedings reveal clearly that trial counsel's failure to seek additional funds to hire a qualified expert was not based on any trial strategy but, instead, on counsel's mistake about the provisions of the statute governing payment of expenses for experts. Counsel's ignorance of the law was clearly outside the range of reasonable professional assistance.

In *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986), trial counsel failed to file a timely suppression motion because he did not know a search had taken place, and he failed to request discovery (or learn of the search) because he mistakenly believed that the prosecution was obliged to turn over inculpatory evidence without a request from him. The Supreme Court held that, even viewing counsel's failure to conduct discovery from his perspective when he decided not to conduct discovery, and even granting deference to counsel's judgment, counsel's decision was unreasonable. 477 U.S. at 385, 106 S.Ct. 2574. So, too, was trial counsel's performance in this case. While complaining repeatedly to the trial court on the record about his inability to hire a qualified expert because of funding limitations, counsel hired an expert he considered to be unqualified. Counsel failed to conduct a reasonable investigation—or any investigation—into the current law; he failed to discover that the former statutory limitation had been eliminated 18 months before the pretrial hearings were held in this case, and more than 2 years before the trial

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

began. As a result of his failure to recognize that the law regarding compensation for experts had changed, counsel proceeded to trial believing he was "stuck" with an unqualified witness. It is counsel's own deficient performance that caused him to be "stuck," and this performance, under prevailing professional norms, was unreasonable.

In a similar case involving trial counsel's mistake about funds available to hire an independent mental-health expert, counsel's decision to proceed without an independent expert was found to be outside the wide range of reasonable professional assistance. *Loyd v. Whitley*, 977 F.2d 149 (5th Cir.1992). The court stated:

> "The state court's factual findings make clear that the decision of defense counsel not to pursue an independent psychological analysis of [the appellant] was neither a strategic choice made after investigation nor a strategic choice made in light of limits on investigation. There were no limitations; funds were available. According to the state factual findings, [lead counsel's] decision had nothing to do with strategy; he wrongly assumed that funds were unavailable and he abandoned what he knew to be an important pursuit. [The second attorney's] decision had not been made after thorough investigation of the law; [counsel] was unaware of the law."

977 F.2d at 158 (footnote omitted).

It is axiomatic that effective assistance of counsel requires knowledge of current state law. An attorney's "lack of knowledge or misunderstanding" of the relevant law "is not only unacceptable under Supreme Court and circuit law," but it is "reprehensible representation in a death-penalty case with [an appellant's] life weighing in the balance." *Hardwick v. Crosby*, 320 F.3d 1127, 1185 n. 207 (11th Cir.2003). That trial counsel was unaware of this significant amendment to the law, which became effective months before any of the crimes with which his client was charged occurred, constitutes deficient performance.[FN23] The avoidance of this claim by the trial court and the majority, and their avoidance of what I believe is a necessary finding of deficient performance should not stand; their finding that counsel's performance was not deficient certainly will not stand in the inevitable upcoming reviews by the Alabama Supreme Court and by federal courts in habeas proceedings.

B. *Prejudice*

***62** Trial counsel's deficient performance in failing to seek additional funds to hire a competent expert when he was fully cognizant of the fact that Payne was neither qualified nor competent to testify as a toolmark examiner for Hinton does not end the inquiry. *Strickland v. Washington* requires a finding of deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. at 687, 104 S.Ct. 2052. The prejudice requirement mandates that the defendant establish that trial counsel's "errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052.

Hinton fully satisfied his burden of proof. I disagree with the conclusion reached by the Rule 32 court and the majority that Hinton failed to demonstrate how he was prejudiced by trial counsel's decision to present Payne as his expert instead of a competent and qualified witness.[FN24]

The majority summarizes the substance of Payne's testimony and his conclusion that none of the bullets recovered from the crime scenes could have been fired from the firearm found in Hinton's mother's house.[FN25] The majority fails to acknowledge the main point of Hinton's argument on this claim—that Payne's testimony added little or nothing to the defense case

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

because Payne was soundly discredited at trial by the prosecution, and that presentation of a *qualified* expert would have changed the outcome of the trial. I do not disagree with the majority's summarization of Payne's testimony on direct examination, but that summarization fails to reveal other significant portions of Payne's testimony or the prosecutor's own summary of that testimony at closing argument. Those portions of the record are necessary to an understanding of the significant prejudice Hinton suffered as a result of trial counsel's deficient performance in failing to seek additional funds to hire a competent expert.

I first note that Payne was a civil engineer, not a firearms and toolmark investigator, and that he received his engineering degree in 1933, more than 50 years before Hinton's trial. (TR. 1571–72.) He spent many years in the military and worked with weapons, but he testified that his duties included "working on various bombs and fuses and then designing delivery schemes with bombs for certain specialized targets" and being the "project officer for the .60 caliber machine gun." (TR. 1573, 1575.) On cross-examination, the prosecutor first elicited from Payne that his work involved specifically matching a bullet to a barrel for only 8 or 9 months of his 25–year career. (TR. 1642.) Payne testified that when he arrived at the state forensics laboratory to examine the evidence, he brought his headpiece, vernier caliper, and his scale. (TR. 1648.) Later in his cross-examination of Payne, the prosecutor read from a 1956 edition of a text Payne had provided to trial counsel, *Firearms Investigation, Identification and Evidence*. (TR. 1660, 1663.) The prosecutor read from a section entitled, "The Charlatans," as follows:

> ***63** "Following the invention of photographic and plastic impressions was a heyday of charlatans. Very few judges knew of anything about firearms. They had heard rumors of marvelous developments. The world was willing to accept anything said to be ... scientific. Almost anyone was permitted to testify in court as an expert. Many had little knowledge but a natural core presence and a great deal of gall. For $50.00 a day, a lot of money in those days, they would go cheerfully into court and swear to most anything. [With a pair] of outside *calipers, an ordinary hand magnifying glass and a steel gauge [or scale]* ... they would cheerfully swear away the life of an innocent man or free, for further depredations against society, the most atrocious criminal."

(TR. 1666–67.)(Emphasis added.) Payne acknowledged that he had those tools with him when he examined the evidence, but in a failed attempt at humor, he told the jury that his scale "must be twice as good as the one they're talking about in the book because mine is graduated in 64ths." (TR. 1667.)

During cross-examination, the prosecutor established that Payne had difficulty operating the microscope at the State forensics lab and that he dropped one of the evidence bullets on the floor while he was examining it. (TR. 1651–54.) Payne stated that, in the seven or eight years before the trial, he had testified in two criminal cases involving firearms and toolmark identification, and one of the cases involved a shotgun, not a handgun. (TR. 1654–55.)

The final questions and answers on cross-examination were:

"[Prosecutor]: Mr. Payne, do you have some problem with your vision?

"[Payne]: Why, yes.

"[Prosecutor]: How many eyes do you have?

"[Payne]: One."

(TR. 1667.)

The prosecutor's cross-examination of Payne was

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

— So.2d —, 2006 WL 1125605 (Ala.Crim.App.)
(Cite as: 2006 WL 1125605 (Ala.Crim.App.))

devastating; it virtually destroyed Payne's credibility. The prosecutor completed that destruction in his closing argument. He noted that Payne's expertise was not in the area of firearms and toolmarks but in military ordnance, while the State's experts had years of training and experience in the relevant field and had testified repeatedly throughout the State. The prosecutor stated that Payne had graduated in 1933 with a degree in engineering, and he argued, "Well, a consulting engineer, ladies and gentlemen, is not a firearms and tool marks expert, and he's no expert. No expert at all." (TR. 1727.) The prosecutor later argued:

> "That demonstrates to me that he knows very, very little about what he came up here to testify about, very little. I said, 'Are you familiar with a comparison microscope?' 'Of course, I've used it at least a thousand times,' and yet when he goes to a lab to use a comparison microscope, he admitted that. It is startling and disturbing, alarming and almost sickening to see someone come up here and give an opinion like that when he tries to cut on the illumination on the microscope, he reaches over and he puts his hand on an electric inscribing tool and cuts that on. This man has no idea, he didn't have a clue about what he was doing. And was going through a learning process right there, but it didn't bother him, it doesn't faze him, he's ready to come down here and give his opinion as an expert witness."
>
> ***64** (TR. 1728.)

The prosecutor argued that the tools Payne used were totally inappropriate and that his use of the stainless steel calipers on the bullets and the gun barrel "demonstrates that Andrew Payne, Jr., did not know what in the world he was doing, but he is ready to come down here and tell you, 'I'm an expert' ...." (TR. 1730.) The prosecutor argued further, "This is a one-eyed man, what kind of depth perception does a one-eyed man have?" (TR. 1731.) He read to the jury "The Charlatans" section of the book Payne had provided and that he had read during Payne's cross-examination and stated, "And I would submit to you that is exactly what you heard from Andrew Payne." (TR. 1732–33.) Near the end of his closing argument, the prosecutor concluded his assault on Payne's credibility:

> "My Lord in heaven, the height of irresponsibility for somebody to come in here and do something like that. That is incredible. It's irresponsible and I ask you to reject his testimony and you have that option because you are the judges of the facts and whose testimony, Mr. Yates' or Mr. Payne's, you will give credence to, and I submit to you that as between these two men there is no match between them. There is no comparison. One man just doesn't have it and the other does it day in and day out, month in and month out, year in and year out, and is recognized across this state as an expert."
>
> (TR. 1733–34.)

The prejudice to Hinton that resulted from counsel's failure to investigate the law and to seek funds to hire a *competent and qualified* expert is obvious from the trial record alone. The prosecutor effectively called the jury's attention to Payne's lack of experience and qualifications, the errors he made during his examination of the evidence, and the fact that he had only one eye. That Payne arrived at the State laboratory with the very instruments mentioned in a section entitled "The Charlatans" in a reference book he provided to defense counsel allowed the prosecutor to cast Payne as a charlatan who was completely lacking in credibility and unworthy of any belief. The trial record establishes the prejudice Hinton suffered because he did not receive the competent defense expert to which he was entitled. Payne was mocked and represented to be no better than a buffoon and a paid liar. The testimony on the *only* physical evidence that connected Hinton to any of the crimes was useless to him because it was delivered by a witness who not qualified or competent to render the opinions.

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

While the prejudice to Hinton is evident in the trial record, the evidence presented at the Rule 32 hearing amplified that prejudice.[FN26] Lannie Emanuel, a firearms and toolmark examiner with the Southwestern Institute of Forensic Sciences in Dallas, Texas, also known as the Dallas County Crime Laboratory, testified that he had been conducting examinations since 1979 and had testified in more than 250 cases. (R. 61–65.) [FN27] Raymond Cooper is also employed at the Dallas County Crime Laboratory and testified that he had been a firearms and toolmark examiner since 1972. He had completed more than 5,000 firearms and toolmarks examinations and had testified as an expert on firearms and toolmarks examination between 250 and 350 times. (R. 113–14.) The third expert at the Rule 32 hearing was John Dillon, a forensic consultant with a specialty in firearms and toolmark identification who had been trained at the Federal Bureau of Investigation ("FBI") laboratory beginning in 1976. (R. 135.) From 1988 until he retired from the FBI in 1994, Dillon served as chief of the firearms and toolmark unit at FBI headquarters. After he retired from the FBI, he provided forensic training and consultation with groups such as the Washington, D.C., police department, the FBI, and the Bureau of Alcohol, Tobacco, and Firearms. He was the immediate past president of the Association of Firearms and Toolmark Examiners.

***65** Payne's 1933 engineering degree and his experience with military ordnance stand in stark contrast to the experience and qualifications of these competent and qualified witnesses. If trial counsel had presented a qualified and competent witness similar to Emanuel, Cooper, and Dillon, the prosecutor could not have argued to the jury that the defense expert was "no expert at all," or that he was in the learning process when he examined the evidence, or that "[i]t is startling and disturbing, alarming and almost sickening to see someone come up here and give an opinion like that ...." This Court has held that it is reasonable to presume that a jury would afford more weight to the testimony of a renowned expert than it would to a lesser-qualified expert. *Banks v. State*, 845 So.2d 9, 28 (Ala.Crim.App.2002). It is even more reasonable to assume that a jury would afford more weight to the testimony of a competent and qualified expert than to a witness who had, at best, minimal qualifications. Hinton provided ample proof of the prejudice he suffered as a result of trial counsel's deficient performance.

In upholding the trial court's denial of relief on this claim, the majority relies on Payne's experience with firearms, his testimony about firearms, and his determination that none of the bullets recovered at the crime scenes matched the weapon recovered from Mrs. Hinton's house. The majority asserts that Payne's testimony was more favorable than that of the Rule 32 experts because he testified unequivocally that none of the bullets had been fired from Mrs. Hinton's weapon. --- So.2d at ---. However, as noted in footnote 9, *supra*, Cooper and Emanuel both testified that their examinations revealed that the recovered weapon *could not have fired* the bullets recovered from the Smotherman shooting because the Smotherman bullets were more misshapen than any bullet they could produce with the recovered weapon. All three experts testified, furthermore, that they could determine only that both of the bullets at the first crime—the Davidson murder—had been fired from the same gun. [FN28] Otherwise, they were unable to determine whether the two bullets fired at the second murder had been fired from the same gun, nor could they determine whether the two bullets recovered from the Smotherman shooting had been fired from the same gun. Emanuel and Cooper testified that the test bullets they fired from the weapon recovered from Mrs. Hinton had markings from the barrel's lands and grooves that were classified as "five right." (R. 74–75.) No land and groove markings were visible on any of the bullets recovered from the victims. (R. 75–78.) Emanuel testified that he was unable to match any of the crime scene bullets to the weapon recovered from Mrs. Hinton. (R. 77–78.) All of the experts testified that

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

they could not otherwise determine whether the Hinton gun fired the crime-scene bullets. Finally, two of the witnesses testified that the ethics code for the Association of Firearms and Toolmark Examiners requires that examiners confer before a case goes to court if they have reached different results in testing. (R. 107, 145.) Emanuel testified that, based on the ethics code, he asked Lawden Yates if he would show Emanuel what he had seen and how he had determined that the six crime-scene bullets were fired from the same gun. Yates refused to do so. (R. 107.)

***66** If such testimony had been presented at Hinton's trial by qualified, competent experts in the field of firearms and toolmark examinations, there is a reasonable probability that the result of the proceeding would have been different. There exists ample evidence that the adversarial system suffered a severe breakdown here because of trial counsel's ignorance of the law and his resulting decision to retain an unqualified witness. As a result, the confidence in the outcome of Hinton's trial has been seriously undermined. The trial court incorrectly denied Hinton relief on this claim of ineffective assistance of counsel and that judgment is due to be reversed. Hinton established that trial counsel's performance was deficient and that he was prejudiced. Hinton must receive a new trial with effective counsel who will retain a competent firearms and toolmark expert to testify about the crucial evidence in this case.

II.

Hinton's trial was also rendered unfair and the result reached was unreliable because the State violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Specifically, Hinton alleged in his petition that the State failed during the discovery process to provide him with the worksheets prepared by Lawden Yates and David Higgins when they examined the bullets and the weapon. He alleged that the worksheets contained question marks where information about the class characteristics (lands and grooves and twist) was to have been recorded and that the evidence would have been critical to the defense. (C. 437.) The trial court and the majority determined that Hinton failed to prove this claim because the State's experts did not rely on class characteristics to conclude that the crime scene bullets matched the gun recovered from Mrs. Hinton's house. The majority also states that the prosecution's experts testified that their conclusions regarding the match were based on striations, or tiny lines, on the bullets and that they did not make notations about the striations, they simply reported that the recovered bullets matched the Hinton weapon. I disagree with the majority's analysis and conclusion.

A defendant is entitled to relief on a *Brady* claim if he establishes that the State suppressed evidence that was exculpatory or favorable to him and was material to the issues at trial. *E.g.*, *Flowers v. State*, 922 So.2d 938, 951 (Ala.Crim.App.2005). Evidence is material if there is a reasonable probability that the result of the proceeding would have been different if the State had disclosed the evidence. *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). A reasonable probability is shown when the State's suppression of evidence undermines confidence in the outcome of the trial. 473 U.S. at 678, 105 S.Ct. 3375. A defendant establishes a *Brady* violation when he shows "that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (footnote omitted).

***67** "Impeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule. See *Giglio v. United States*, 405 U.S. 150, 154 (1972). Such evidence is 'evidence favorable to an accused,' *Brady [v. Maryland*, 373 U.S. 83, 87 (1963)], so that, if disclosed and used effectively, it may make the difference between conviction and acquittal. Cf. *Napue v. Illinois*, 360 U.S. 264, 269 (1959) ('The jury's estimate of the truthfulness and

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

> reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend')."

United States v. Bagley, 473 U.S. at 676, 105 S.Ct. 3375.

"Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska* 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). The worksheets should have been provided to the defense. The suppressed evidence was favorable to Hinton and material to the issues at trial—principally, whether the recovered bullets matched the gun seized at Mrs. Hinton's house. The State's suppression of that evidence denied Hinton his right to cross-examine the State's witnesses on the missing data on the worksheets and prevented him from raising questions about the validity and credibility of the testimony presented by the State's experts. The trial court erred when it denied relief on this claim, and that judgment should be reversed. Hinton is entitled to a new trial based on this claim of error.

The worksheets in question are documents used to record data from the examinations of firearms, bullets, and cartridges. The worksheets contain spaces to record information about 12 criteria that might be revealed from the examination of bullets, including the number of lands and grooves, the width of the lands, the width of the grooves, and twist. (C. 2485, 2487.) [FN2] The worksheets completed by Yates and Higgins during their examinations of the bullets recovered from the crime scenes contain many dashes and question marks in the spaces designated for information about twist and lands and grooves, indicating that measurements were impossible to discern or were not taken. (C. 2258, 2323–24.) Examination of the weapon recovered at the Hinton house revealed class characteristics of "5 right," meaning the barrel had 5 lands and grooves and that bullets fired from it were marked with a right twist. (C. 2485.) Trial counsel did not know that the State's experts had been unable to discern or measure the class characteristics of the bullets recovered at the crime scenes because this crucial information had not been disclosed to him. He was unaware that the recovered weapon had class characteristics of "5 right," and that none of the crime-scene bullets were found to possess those class characteristics. Counsel was denied the opportunity to question the State's experts about the reliability of their conclusions because he was denied access to the very information that would have permitted him to do so. Hinton's constitutional right to a full and meaningful cross-examination was denied by the State's failure to disclose the worksheets, in violation of *Brady* and its progeny.

***68** The State argued on appeal, and the majority holds, that the worksheets did not contain exculpatory or material information because, it argues, the State's experts did not base their conclusions on the class characteristics of the bullets; rather, they based their conclusions that all of the crime scene bullets were fired from the Hinton weapon on the microscopic striations on the bullets. The record, however, does not support this assertion. Higgins testified, in response to the prosecutor's question about the comparison of the bullets from the Davidson murder to the Hinton weapon: "After determining that there's some similarities as far as caliber, *class-type characteristics* as best can be determined—" (TR. 1210.) (Emphasis added.) Yates testified, "After examining the six [crime-scene] bullets I was able to determine that they possessed and were fired from a firearm *with the same class characteristics*, those being a .38 or that size caliber firearm, and that it would be a revolver because of the skid marks found on those bullets ...." (TR. 1287.) (Emphasis added.) Furthermore, during the prosecution's direct examination of Higgins and Yates, he elicited testimony about how lands and grooves affect a bullet as it is fired and how each barrel marks bullets in a unique, repetitive way. (TR.

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

1219, 1222–23, 1230–31, 1275, 1275–6, 1288.) Immediately after Higgins testified about lands and grooves and twist, the prosecutor asked whether he had compared the two bullets he had test-fired from the Hinton weapon; Hinton testified that he observed "repetitive markings" on the bullets. (TR. 1223.) The prosecutor then asked Higgins whether he had compared the test bullets to the bullets from the Davidson murder, and Higgins testified that he observed "repetitive marks" on the crime-scene bullets. (TR. 1225.) He concluded that the crime-scene bullets had been fired down the barrel of the Hinton weapon. (TR. 1233–34.)

The majority correctly states that, in their depositions in this Rule 32 proceeding, Yates and Higgins testified that their conclusions were based on microscopic striations and not on lands and grooves and twist. However, that point was not apparent from their testimony at trial, and the prosecution's elicitation of testimony about class characteristics logically indicated to the jury that Yates's and Higgins's conclusions were, in fact, based on class characteristics in addition to microscopic striations. At a minimum, trial counsel should have been provided the worksheets so that he could have cross-examined the State's witnesses about the many dashes, question marks, and missing data about lands and grooves and twist on the crime-scene bullets. Trial counsel should have been able to cross-examine the State's experts on why the recovered weapon and the test-fired bullets had class characteristics of "5 right," while none of the crime-scene bullets had class characteristics. Trial counsel should have been allowed to argue to the jury that the conclusions of the State's experts were based on minimal data and not on an extensive series of measurements and class characteristics which their testimony implied. Finally, if trial counsel had known that the State's experts had not based their opinions at all on class characteristics, trial counsel might have attempted to prevent testimony from those experts about class characteristics; counsel could have argued that testimony about class characteristics would have been irrelevant because the experts had not based their conclusions on class characteristics.

***69** The State violated *Brady v. Maryland* when it suppressed the firearms worksheets. The evidence was favorable to Hinton and it was material to the most crucial issue in the case. Hinton was denied his right to cross-examine the State's experts on evidence that would have raised questions about the validity and certainty of their conclusions that the crime-scene bullets matched the weapon recovered from Hinton's mother's house. The jury's lack of exposure to evidence of the uncertainty of the State's experts about class characteristics could have made the difference between conviction and acquittal.

"We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on [the prosecution witness's] testimony which provided 'a crucial link in the proof ... of petitioner's act.' *Douglas v. Alabama*, 380 U.S. [415, 419 (1965)]."

Davis v. Alaska, 415 U.S. at 317, 94 S.Ct. 1105. "On these facts it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. Petitioner was thus denied the right of effective cross-examination which ' "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Brookhart v. Janis*, 384 U.S. 1, 3 [(1966)].' *Smith v. Illinois*, 390 U.S. 129, 131 (1968)."

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

Id. at 318, 94 S.Ct. 1105.

Hinton is entitled to relief on this claim. The trial court's judgment is due to be reversed, and Hinton should receive a new trial.

Conclusion

Anthony Ray Hinton did not receive a fair trial. His capital-murder convictions and death sentence were obtained after the had State suppressed favorable, material evidence and after trial counsel had rendered ineffective assistance by failing to seek additional funds for an expert and by presenting an unqualified witness to testify as an expert. In all my tenure on the bench, I have never seen the State successfully prosecute a capital-murder case when the only evidence of guilt consisted of testimony by a firearms and toolmark expert. This was an amazing prosecutorial feat, which could have been tested if Hinton had received effective representation and had been provided full and complete discovery. Hinton received neither.

Confidence in the outcome of Hinton's trial has been seriously undermined as a result of the errors discussed above. Because a man's life hangs in the balance and because I am convinced that this case will not withstand the many additional levels of review in State and federal courts, the only remedy for these violations of Hinton's rights is to grant the relief requested in his Rule 32 petition—a new trial.

*70 For the foregoing reasons, I dissent.

SHAW, Judge, dissenting.

In *Ex parte Frazier*, 562 So.2d 560, 565 (Ala.1989), the Alabama Supreme Court, quoting *Estes v. Texas*, 381 U.S. 532, 540, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965), stated: " 'Court proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the *sine qua non* of a fair trial. Over the centuries Anglo–American courts have devised careful safeguards by rule and otherwise to protect and facilitate the performance of this high function.' "

Based on the evidence presented to it, a jury concluded on September 17, 1986, that Anthony Ray Hinton was guilty of the execution-style capital murders of John Davidson and Thomas Wayne Vason. That same jury recommended that Hinton be sentenced to death, and the trial court, accepting that recommendation, did so. Before filing this Rule 32, Ala.R.Crim.P., petition on August 15, 1990, the fairness of Hinton's trial had been reviewed and confirmed not only by this Court, but also by the Alabama Supreme Court and the United States Supreme Court. Now, over 20 years after these murders, and almost 18 years after this Court first reviewed Hinton's case on direct appeal, we have been asked once again to examine Hinton's trial, this time through the mechanism of postconviction review—one of the safeguards put in place to ensure the fairness of criminal prosecutions.[FN20]

After carefully reviewing the briefs and after examining both the record on direct appeal and the Rule 32 record, I am satisfied that there is only one issue that has been properly raised and that merits this Court's intervention—whether, based on the standard set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), Hinton's trial counsel rendered ineffective assistance by retaining and proceeding to trial with an *unqualified* firearms witness.

I note, initially, that I am concerned that confidence in the outcome of Hinton's trial was seriously compromised by the failure of trial counsel to seek the additional funding to which he was entitled under § 15–12–21(d), Ala.Code 1975. After all, it was essential from a defense perspective that trial counsel retain a qualified firearms and toolmarks expert to testify with respect to what the parties agree was the crucial issue at trial—whether the bullets found at the crime

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

scenes could be connected to the gun found at the residence of Hinton's mother. I also seriously question whether this case, in its present posture, will be able to withstand the additional levels of scrutiny in both state and federal courts.

However, I feel that it is premature to reverse the circuit court's [FN21] judgment because it does not appear to me, after examining the record on direct appeal and the Rule 32 record, that a specific finding as to whether Andrew Payne was a qualified firearms and toolmarks expert has ever been made. Although Payne testified at trial, it is not clear that trial counsel proffered him as an expert in toolmarks examination, and it does not appear that the trial court ever actually ruled that, based on his knowledge, skill, experience, training, or education, Payne was qualified to give authoritative testimony on that subject. Payne testified that he was a civil engineer with a military background primarily in heavy weapons and ordnance and that he had had limited experience during his career in toolmarks examination of handguns. To say that Payne was soundly discredited at trial on cross-examination by the prosecutor would be an understatement. However, prosecutors successfully challenge the credibility of even qualified expert defense witnesses in many cases and for many reasons. Therefore, to me it is not dispositive that the prosecutor successfully challenged Payne's credibility before the jury. Rather, the dispositive issue is whether Payne was a qualified firearms and toolmarks expert.

*71 The record on direct appeal indicates that Payne's credibility as a firearms and toolmarks expert was seriously questioned at trial by both Hinton's trial counsel and by the prosecutor. However, the prosecutor obviously did not challenge Payne's qualifications to testify as an expert witness, and the trial court never specifically found Payne to be qualified to testify about toolmarks. Likewise, the record of the Rule 32 proceedings also reflects that the circuit court made no specific findings on this question. Although Hinton claimed in his petition that his trial counsel had rendered ineffective assistance by failing to retain a qualified firearms and toolmarks expert, the circuit court addressed the claim as follows:

"b. In paragraph 44 of his petition, Hinton alleges that his trial counsel was ineffective for failing to obtain and present qualified ballistics experts who could have proved that the bullets recovered from the crime scenes were not fired from the gun recovered in his mother's home. This claim, which was first raised in the 1998 amended petition as Claim nn, is dismissed for the following reasons:

"....

"[T]his claim is dismissed in accordance with Alabama Rule of Criminal Procedure 32.7(d) for failure to state a claim upon which relief may be granted because there is no material issue of fact or law. Hinton alleges that his trial counsel was deficient for not presenting on [sic] evidence that the bullets found at the crime scenes were not fired from the gun found at his mother's house; however, Hinton's counsel did put on such testimony. Hinton's counsel presented the testimony of Andrew H. Payne, Jr., a consulting engineer who studied firearms and projectiles. (T.R. 1571–1667) Mr. Payne has been qualified as an expert ballistics witness for several criminal and civil cases in Alabama. Mr. Payne testified that the type of bullets fired from the gun recovered at Hinton's mother's house used a corrosive primer that eventually corroded the toolmarkings inside the barrel of the gun. (T.R. 1616–1617) Mr. Payne further testified that the toolmarkings in this gun had been corroded away and that it would not be possible to make a positive final match between this gun and any expended bullets. (T.R. 1618–1621) In addition, Mr. Payne testified that the bullets from the three crime scenes did not match. (T.R. 1631–1637) Accordingly, the trial record clearly refutes Hinton's claim that his trial counsel was ineffective for failure to present testimony in rebuttal to the State's ballistics evi-

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

dence. For these same reasons, this claim is also dismissed under Alabama Rule of Criminal Procedure 32.3 for failure to meet his burden of proving the facts necessary to warrant relief.

"c. In paragraph 45 of his petition, Hinton alleges that his trial counsel was ineffective for failing to file a motion for continuance when he realized his ballistics expert was not qualified to testify and for failing to seek additional funds to hire a better expert witness. This claim, which is being raised for the first time in this third amended petition, is dismissed for the following reasons:

*72 "....

"[T]his claim is dismissed in accordance with Alabama Rule of Criminal Procedure 32.7(d) for failure to state a claim upon which relief may be granted because there is no material issue of fact or law. Hinton alleges in Paragraph 44 of this petition that a qualified ballistics expert would have testified that the bullets fired at the three crime scenes were not fired by the gun recovered at his mother's house; however, it is exactly what his ballistics expert testified at trial. (T.R. 1571–1668) Thus, Hinton fails to meet his burden of pleading or proving that his counsel was deficient or how he was prejudiced when the expert chosen by trial counsel testified to what he claims any other 'qualified' ballistics expert would have testified. See *Boyd v. State*, 746 So.2d 364, 375 (Ala.Crim.App.1999) ('Strategic choices made after a thorough investigation of relevant law and facts are virtually unchallengeable.'). Accordingly, this claim is dismissed. For these same reasons, this claim is also dismissed under Rule 32.3 for failure to meet his burden or proving the facts necessary to warrant relief."

(C. 1545–50.)

The circuit court characterized the issue as whether trial counsel had presented evidence indicating that the bullets found at the crime scenes could not have been fired from the gun found at the home of Hinton's mother and then rejected Hinton's claim on the ground that Payne had provided favorable testimony. The circuit court did not address directly the issue whether Payne was qualified to be testifying in the first place. Additionally, although the circuit court noted in passing that Payne had "been qualified as an expert ballistics witness for several criminal and civil cases in Alabama" (C. 1547), that statement does not necessarily reflect a finding that Payne was qualified to testify as a toolmarks expert in this case. Moreover, the record on direct appeal calls into question whether this statement is even accurate. At trial, Payne testified as follows:

"Q. You had occasions to testify in court before as a consulting engineer?

"A. Yes, sir; I have a time or two.

"Q. Do you have a judgment about how many times you've done that?

"A. No, but it would be in excess of a thousand.

"Q. Now, I'd like to narrow that field of endeavor down, sir, and ask you how many times in the last five years have you testified in court in a criminal case involving firearms and tool marks identification?

"A. I think twice. Not sure about the five years, maybe it was seven years. Eight years.

"Q. And those two times, Mr. Payne, involved shotguns? Once in Montgomery County and once in Jefferson County?

"A. Well, I'm sorry, I just don't remember but one shotgun case and that was here in Jefferson County.

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

The only other one I'm talking about involved a projectile somewhat similar to what we're talking about here today.

"Q. And of those two times that you do recall how many times did you testify for the defendant?

***73** "A. For the what?

"Q. For the defense?

"A. None. I was testifying for the accused. Oh, that's what you call the defendant, that's right.

"Q. Yes, sir.

"A. Yes, sir; you call it the defendant. In both for the defendant.

"Q. Yes, sir.

"A. Let me—let me correct that a minute.

"Q. Where you received a fee—

"A. No, wait, let me correct that. Once was for the defendant and the one in Opelika, that would be for a plaintiff, not for the defendant.

"Q. That was a civil case?

"A. Well, it was a civil case, yes.

"Q. Had to do with whether or not a gun malfunctioned and someone had a right to sue a firearms company for some type of damages?

"A. No, sir; it was whether a man killed himself or whether he was murdered.

"Q. But you were testifying in a civil suit?

"A. Right.

"Q. Not a criminal case?

"A. That's correct."

(Record on Direct Appeal, R. 1654–56.) It is impossible for me to tell from this line of questioning whether Payne was really ever found to be qualified to testify in court as a firearms and toolmarks expert.[FN32]

If Payne was in fact a qualified firearms and toolmarks expert, even if his qualifications did not necessarily match up with those possessed by the State's experts, then I would affirm the circuit court's judgment denying Rule 32 relief. Sorting out conflicting testimony from qualified experts presented at trial is solely within the province of the jury. Rule 32 is not a mechanism by which those convicted of criminal offenses may argue many years after trial that they now have found better expert witnesses that a newly selected jury should hear. On the other hand, if Payne was not qualified to testify authoritatively as a firearms and toolmarks expert, then, based on the *Strickland v. Washington* standard, I would have no choice but to reverse the circuit court's judgment denying Rule 32 relief on the ground that trial counsel had rendered ineffective assistance to Hinton. It goes without saying that, with knowledge that sufficient funds were available to have a qualified firearms and toolmarks expert, no reasonable criminal defense lawyer would seek out and hire an unqualified firearms witness. Such a lawyer would be charged with the knowledge that in a situation where that witness's testimony was crucial to the pivotal issue in the case, the witness would be subjected to a withering cross-examination that could ultimately result in the complete impeachment of his or her credibility. In addition, based on the evidence presented at trial, if the testimony or the only physical evidence that con-

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

nected Hinton to the capital murders was, in fact, presented by a witness who was not competent to render an opinion, then it was useless to him in rebutting the opinions of the State's experts, thereby resulting in prejudice under the *Strickland v. Washington* standard.

I think that it is also appropriate to note the State's argument on appeal that Payne was a qualified firearms and toolmarks expert and that, even if he was not the best witness that could have been retained, he was the best witness that trial counsel could afford. As the State noted on page 70 of its brief, "The reason [trial counsel] hired Mr. Payne instead of another 'renowned' expert with whom he spoke was the fee limitation—not his diligence in searching for an expert." The irony of the State's first argument is that it is exactly the opposite of the argument the prosecutor made at trial—that Payne was a charlatan and not an expert with regard to firearms and toolmarks examination.[FN33] And, of course, in light of § 15–12–21(d), the State's second argument misses the point completely.

***74** This is an extremely important case, not only for Hinton and the families of the victims of these horrendous crimes, but also for the people of Alabama, who must have confidence that the criminal justice system is capable of achieving its ultimate purpose—the fair conviction and punishment of the guilty and the protection of the innocent. It is regrettable that the wheels of justice have turned slowly in this case, from the perspectives of both Hinton and the families of the victims. However, as I noted in my special writing in *Dowdell v. State*, 854 So.2d 1195 (Ala.Crim.App.2002), the orderly processing of cases through the courts is an important value, but it is not the end in itself.

For these reasons, I would remand this case to the circuit court for a specific finding as to whether Andrew Payne was indeed qualified to testify as an expert firearms and toolmarks examiner based on his knowledge, skill, experience, training, or education. Rule 32.9(d), Ala.R.Crim.P., requires that if an evidentiary hearing is conducted on a Rule 32 petition, "[t]he court shall make specific findings of fact relating to each material issue of fact presented." A statement of the basis of a circuit court's decision is essential to afford the appellant due process. See, e.g., *Dedeaux v. State*, [Ms. CR–04–0792, December 23, 2005] — So.2d —— (Ala.Crim.App.2005) (remanded for findings on ineffective-assistance claim); *Crum v. State*, 911 So.2d 34 (Ala.Crim.App.2004) (same); *Cain v. State*, 876 So.2d 1178 (Ala.Crim.App.2003) (same). I would also authorize the circuit court to hold another evidentiary hearing should it deem it necessary. Neither the parties nor the members of this Court can agree as to whether Payne was qualified to testify. Because, in my view, Hinton's ineffective-assistance claim turns on whether Payne was a qualified firearms and toolmarks expert, that issue should first be addressed by the circuit court. Until that is done, I do not believe that this case is in the right posture for us to decide one way or the other whether the circuit court exceeded its discretion in denying Rule 32 relief.

FN1. In her dissent, Judge Cobb states that Payne stated on cross-examination "that his work involved specifically matching a bullet to a barrel for only 8 or 9 months of his 25–year career." —— So.2d at ——. However, Payne actually specifically testified that he dealt with matching ordnance to a particular barrel "perhaps for a period there of six to eight or nine months *a hundred percent*." (A.R. 1641.) However, he also testified that he spent twenty-five-and-one-half years in the ordnance program for the Air Force, and he stated that the response of eight or nine months was his "answer so far as your question was concerned about specifically matching ... a projectile to a barrel." (A.R. 1642.)

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

FN2. In her dissent, Judge Cobb notes that, "[d]uring cross-examination, the prosecutor established that Payne had difficulty operating the microscope at the State forensics lab." — So.2d at ——. However, when he was asked about this during his deposition, Higgins stated: "[O]n the scope we had at that time, unless you were familiar with that model, you would need someone familiar with it to show you. I mean that would be—that could happen to anyone." (C.R. 2210.)

FN3. However, during questioning by the circuit court, Emanuel admitted that they tested only one of the revolver's cylinders rather than all of them because they thought it had the worst out of time problem and it would probably produce the worst example of an out of time bullet fired from that revolver. He also admitted that there were indications that the revolver had been cleaned before he examined it.

FN4. In her dissent, Judge Cobb apparently relies on this passage to conclude that Emanuel testified that the revolver that was recovered from the appellant's mother "could not have fired State's Exhibit 54 from the Smotherman shooting." — So.2d at ——. However, a closer examination of his testimony reveals that such an interpretation overstates his testimony. In response to the first question quoted above, Emanuel carefully limited his answer and stated that he did not believe that the revolver was capable of producing a bullet like State's Exhibit 54 "if it's fired normally without some type of external manipulation." (R. 86.) In response to the second question quoted above, Emanuel indicated only that, even when manipulating the revolver, he could not produce a bullet that was comparable to State's Exhibit 54.

FN5. Cooper testified that the revolver showed very little out of time slippage when it was fired in the single action mode and that it showed more when it was fired in double action mode.

FN6. In her dissent, Judge Cobb apparently relies on this passage to conclude that Cooper testified that, in his opinion, the Smotherman bullets could not have been fired from the revolver that was recovered from the appellant's mother. However, a closer examination of his testimony reveals that such an interpretation overstates his testimony. In response to the first question quoted above, Cooper indicated only that, even when he manipulated the revolver, he could not produce a bullet that looked like State's Exhibit 54. In response to the second question quoted above, Cooper carefully limited his answer. Although the appellant's counsel asked Cooper if it was his opinion that the revolver's mechanical condition made it impossible for the revolver to produce a bullet like State's Exhibit 54, Cooper specifically limited his answer and stated that, in the testing in which he was involved, he could not reproduce what happened to the Smotherman bullets. That is a far cry from saying that the revolver could not have produced the Smotherman bullets.

FN7. At one point during the State's cross-examination, Cooper expressed confusion about the questions being asked and stated that it was his opinion that the Smotherman bullets could not have been fired from the revolver that was recovered from the appellant's mother because of "the mechanical inability of this weapon to produce a bullet of that nature." (R. 123.) However, on redirect examination, the following occurred:

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

"[THE APPELLANT'S COUNSEL:] With regard to the examination you made with the weapon where it was out of time, just so I'm clear that we all understand your testimony, it's your testimony that whatever the weapon is that fired State's Exhibit 54 would have been more severely out of time than what you were able to make this weapon, State's Exhibit 79, fire; is that correct?

"[COOPER:] That's correct.

"[THE APPELLANT'S COUNSEL:] And so any variation between its most extreme out of time firing and its most precise in time firing wouldn't get you a bullet that looked like State's Exhibit 54?

"[COOPER:] We could never reproduce that."

(R. 129–30.) Finally, on re-cross-examination, the following occurred:

"[STATE'S COUNSEL:] And your belief that State's Exhibit 54 did not come from State's Exhibit 79 comes based on your examination of the skidding or the out of time characteristics.

"[COOPER:] It's based on the inability of that weapon being able to produce a bullet of that type.'

(R. 130–31.)

In her dissent, Judge Cobb also apparently relies on these passages to conclude that Cooper testified that, in his opinion, the Smotherman bullets could not have been fired from the revolver that was recovered from the appellant's mother. However, Emanuel testified that they tested only one cylinder of the revolver, and Cooper testified about the safety and strength limitations on the testing. Also, Cooper specifically and repeatedly qualified his testimony by stating that they had not been able, in their testing of the revolver, to produce a result that looked like State's Exhibit 54.

FN8. In her dissent, Judge Cobb notes that "two of the witnesses testified that the ethics code for the Association of Firearms and Toolmark Examiners requires that examiners confer before a case goes to court if they have reached different results in testing. (R. 107, 145.) Emanuel testified that, based on the ethics code, he asked Lawden Yates if he would show Emanuel what he had seen and how he had determined that the six crime-scene bullets were fired from the same gun. Yates refused to do so." — So.2d at ——. In Judge Cobb's view, Emanuel and Cooper testified that the revolver that was recovered from the appellant's mother could not have fired one or both of the Smotherman bullets. Oppositely, Dillon testified that he could not determine whether or not the Smotherman bullets had been fired from the revolver that was recovered from the appellant's mother. Interestingly, however, the record does not indicate that these experts conferred concerning their "differing results," thus lending further support to the conclusion that Judge Cobb's dissent overstates Emanuel's and Cooper's testimony.

FN9. To the extent the appellant appears to argue that the trial court appointed only one attorney to represent him and paid counsel

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

for only one case, his arguments are precluded because he could have raised them at trial and on direct appeal, but did not. *See* Rule 32.2(a)(3) and (5), Ala. R.Crim. P.

FN10. Although Perhacs indicated that he contacted several experts whom he would have considered qualified, he did not testify that any of them actually would have refuted the testimony of the State's experts. Moreover, during the Rule 32 proceedings, the appellant did not present any evidence that any of the referenced experts actually would have been more qualified than Payne.

FN11. In her dissent, Judge Cobb notes that counsel appeared not to be aware of the amendment even in 2002 when he testified during the evidentiary hearing. In fact, during the evidentiary hearing, the appellant's counsel stated: "The only way he can make that showing [that he was denied the effective assistance of counsel due to inadequate funding for experts] is by demonstrating what would have been done if the limitations did not exist." (R. 45.) Thus, it appears that, during the evidentiary hearing, even the appellant's counsel believed that the limitations were still in place at the time of the appellant's trial.

FN12. In her dissent, Judge Cobb relies heavily on its judgments that "Payne was soundly discredited"; that "[t]he prosecutor's cross-examination of Payne was devastating and it virtually destroyed Payne's credibility"; that "[t]he prosecutor completed that destruction in his closing argument"; that "the prosecutor effectively called the jury's attention to Payne's lack of experience and qualifications, the errors he made during his examination of the evidence, and that he had only one eye"; that the prosecutor "cast Payne as a charlatan who was completely lacking in credibility and unworthy of belief"; that "Payne was mocked and represented to be no better than a buffoon and a paid liar"; and that "[t]he testimony on the *only* physical evidence that connected Hinton to any of the crimes was useless to him because it was delivered by a witness who was not qualified or competent to render the opinions" to conclude that Payne was unqualified or incompetent and that counsel rendered ineffective assistance for proceeding to trial with him as an expert. — So.2d at ——. However, these are judgment calls and credibility determinations that are simply not appropriate for this court to make. Rather, after the trial court initially recognized Payne as an expert, it was the function of the jury to determine his credibility. In this regard, during the evidentiary hearing, the following discussion occurred:

"THE COURT: Let me say this. Mr. Payne has been recognized or was recognized as an expert and testified both in civil and criminal courts all over the state.

"[THE APPELLANT'S COUNSEL]: Well, he was characterized by the state at trial, Your Honor, as a charlatan, as someone who didn't know anything about this kind of testimony. He was mocked.

"THE COURT: Oh, well, I see that on experts quite often by either side."

(R. 25.)

FN13. *See* Part I.A., supra, for a discussion about the limited nature of the testimony and the carefully phrased conclusions of the appellant's Rule 32 experts.

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

FN14. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)

FN15. The appellant's argument that counsel rendered ineffective assistance on appeal because he did not challenge the denial of funds necessary to protect his rights is not properly before this court because he did not first present it to the circuit court. *See Morrison v. State*, 551 So.2d 435 (Ala.Crim.App.1989).

FN16. In the circuit court, the appellant challenged execution by electrocution.

FN17. The transcript of the trial proceedings will be designated by "TR. ___."

FN18. The circuit court adopted the State's proposed findings and order *in toto*.

FN19. The order actually states that Hinton alleged that trial counsel failed to present "*on* evidence that the bullets found at the crime scenes were not fired ...." (C. 1547.) The majority apparently determined that the trial court intended to interpret the claim to be that trial counsel failed to present *any* evidence about the bullets not matching the weapon recovered at Hinton's mother's house.

FN20. Although the majority adopts the trial court's findings on this claim, it then finds that the issue was not preserved for our review because it was not first presented to the court below. Although the claim could have been presented more clearly, I believe that Hinton's argument was raised, and the trial court notes it in the portion of the order quoted by the majority. (C. 1548.)

FN21. Citations to the clerk's record from Hinton's trial will be designated "TC. ___ "

FN22. The trial court and the majority summarized Hinton's claim as " 'Hinton alleges that his trial counsel was ineffective ... for failing to seek additional funds to hire *a better expert witness* ....' " — So.2d at —— (quoting C. 1548) (emphasis added). The claim is more accurately characterized as alleging that trial counsel was ineffective for not securing funds to hire a qualified and competent expert, not a "better" witness.

FN23. Counsel appeared to be unaware of the 1984 amendment to the statute even in 2002 when he testified at the Rule 32 hearing. (R. 181, 188, 207.)

FN24. In reaching it conclusion, the Rule 32 court relied on the rule of law stating that strategic choices based on a thorough investigation of the facts and the law are virtually unchallengeable. (C. 1550.) However, as discussed above, reliance on a claim of "strategic choice" fails utterly here because trial counsel's decision to present Payne's testimony was not based on strategy at all; it was the result of trial counsel's ignorance of the current law. The majority apparently recognizes this because it did not adopt this portion of the trial court's order.

FN25. The majority notes that Payne's testimony was unequivocal on that point, and asserts that none of Hinton's Rule 32 experts could testify unequivocally that the recovered bullets had not been fired from that weapon. The majority disregarded the significant testimony of Raymond Cooper of the Southwestern Institute of Forensic Sciences in Dallas, Texas, the Dallas County crime

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

laboratory, who testified repeatedly that, in his opinion, State's Exhibits 54 and 55, the bullets recovered from the Smotherman shooting *could not have been fired* from the recovered weapon because the weapon could not produce a bullet that was marked and as misshapen as were the Smotherman bullets. (R. 121, 123, 129–30, 130.) Lannie Emanuel, who is also employed at the Dallas County crime lab, testified that the weapon recovered from Mrs. Hinton's house could not have fired State's Exhibit 54 from the Smotherman shooting. This testimony is especially significant because Smotherman identified Hinton as his assailant. If the jury had heard a *qualified* expert testify that the bullets retrieved at the scene of that shooting could not have been fired from the weapon recovered at Mrs. Hinton's house, the prosecution's entire case against Hinton would have had been seriously compromised. This testimony, alone, if it had been presented at Hinton's trial, could have resulted in a different outcome.

FN26. The Rule 32 record contains the deposition of Lawden Yates, who testified for the State at trial. Yates testified that he was "not particularly impressed with [Payne's] capabilities in firearms and tool marks identification." (C. 2304.) Yates explained that Payne "demonstrated an obvious limited ability to do the kind of work that we were conducting at the time even though he was brought in as an expert in firearms identification." (C. 2304–05.) Yates also testified that the tools Payne brought with him to examine the evidence "indicated to me that he probably had limited knowledge of firearms identification." (C. 2305.)

FN27. Pages of the transcript of the Rule 32 hearing will be designated "R. ___ "

FN28. I find it interesting that, when David Higgins first examined the two bullets from the Davidson shooting, he submitted a report on February 6, 1985, that stated, "Laboratory analysis revealed both bullets to be mutilated. This condition *prevented further characterization.*" (C. 1443.) (Emphasis added.) Yet, on August 2, 1985, Lawden Yates submitted a report stating that the two bullets from the Davidson murder had been compared to test bullets fired from the Hinton gun and that the examination "revealed ample evidence that each of the two submitted spent projectiles were fired through the barrel" of the weapon recovered at Mrs. Hinton's house. (C. 1446.)

FN29. The worksheets were admitted at the Rule 32 hearing. (R. 201–04.)

FN30. This case was not orally argued and submitted to this Court until November 15, 2005.

FN31. The same judge presided over both the trial and the Rule 32 proceedings. For clarity, I will refer to the "trial court" when addressing the trial proceedings and to the "circuit court" when addressing the Rule 32 proceedings.

FN32. See also *Barnes v. State*, 429 So.2d 1114, 1118 (Ala.Crim.App.1982), wherein this Court noted:

> "After the State rested, the defense called Andrew Payne to the stand. Mr. Payne was retired from the Air Force where he worked with weapons and continued to do so as a hobby. He was then employed as a consulting engineer."

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

> FN33. The State's argument on appeal consists of a single-sentence reference to the circuit court's order: "First, as noted by Judge Garrett, Mr. Payne is a 'consulting engineer who studied firearms and projectiles' and has 'been qualified as an expert ballistics witness' on numerous occasions." (Page 69 of State's brief.)

Ala.Crim.App.,2006.
Hinton v. State
--- So.2d ----, 2006 WL 1125605 (Ala.Crim.App.)

END OF DOCUMENT

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

APPENDIX B

--- So.2d ----, 2008 WL 4603723 (Ala.)
(Cite as: 2008 WL 4603723 (Ala.))

H

Only the Westlaw citation is currently available.

NOT YET RELEASED FOR PUBLICATION.

Supreme Court of Alabama.
Ex parte **Anthony Ray HINTON**
(In re Anthony Ray Hinton
v.
State of Alabama).

1051390.
Oct. 17, 2008.

Background: Defendant petitioned for postconviction relief after his convictions for capital murder and sentences of death were affirmed by the Court of Criminal Appeals, 548 So.2d 547, and the Supreme Court, 548 So.2d 562. The Jefferson Circuit Court, Nos. CC-85-3363.10 and CC-85-3364.10, James S. Garrett, J., denied the petition. Defendant appealed. The Court of Criminal Appeals affirmed, --- So.3d ---. Defendant filed a petition for certiorari review, which was granted as to one issue.

Holding: The Supreme Court held that an examination of that issue would be premature, given the absence of certain findings by the postconviction court.

Reversed and remanded.

Smith, J., concurred specially and filed opinion.

West Headnotes

Criminal Law 110 ⇨1181.5(6)

110 Criminal Law
110XXIV Review
110XXIV(U) Determination and Disposition of Cause
110k1181.5 Remand in General; Vacation
110k1181.5(3) Remand for Determination or Reconsideration of Particular Matters
110k1181.5(6) k. Counsel for Accused. Most Cited Cases

Absence of specific findings by postconviction court as to whether witness was qualified as a firearms-identification expert meant that it would be premature for the Supreme Court to examine defendant's postconviction claim that defense counsel rendered ineffective assistance at capital-murder trial by allegedly failing to procure a competent firearms-identifications expert, and remand would be ordered for postconviction court to make such findings, even though the state suggested that the Supreme Court could easily determine whether witness was qualified; rule required postconviction court to make specific findings as to each material issue of fact presented. U.S.C.A. Const.Amend. 6; Rules Crim.Proc., Rule 32.9(d).

Bryan A. Stevenson, Cathleen I. Price, Charlotte R. Morrison, and Aaryn M. Urell, Equal Justice Initiative of Alabama, Montgomery, for petitioner.

Troy King, atty. gen., and Corey L. Maze, asst. atty. gen., for respondent.

PER CURIAM.

*1 Anthony Ray Hinton challenges his two capital-murder convictions and the resulting sentences of death. We granted certiorari review to determine one issue: whether Hinton was denied effective assistance of counsel because his trial counsel allegedly failed to procure a competent firearms-identification expert to testify in his defense.

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

Background

Hinton was convicted in September 1986 of two counts of murder made capital because the murders were committed during the course of a robbery. The jury recommended by a vote of 10-2 that Hinton be sentenced to death on each count. The trial court accepted the jury's advisory verdict and sentenced Hinton to death. Hinton appealed.

The Court of Criminal Appeals affirmed the convictions and sentences. *Hinton v. State*, 548 So.2d 547 (Ala.Crim.App.1988). This Court then affirmed the judgment of the Court of Criminal Appeals, *Ex parte Hinton*, 548 So.2d 562 (Ala.1989), and the United States Supreme Court denied Hinton's petition for certiorari review. *Hinton v. Alabama*, 493 U.S. 969, 110 S.Ct. 419, 107 L.Ed.2d 383 (1989).

Hinton subsequently filed a petition pursuant to Rule 32, Ala. R.Crim. P., challenging his convictions and sentences. The petition was amended several times. After an evidentiary hearing, the trial court denied the petition. Hinton appealed the trial court's denial of his Rule 32 petition to the Court of Criminal Appeals.

The Court of Criminal Appeals affirmed the judgment of the trial court. *Hinton v. State*, [Ms. CR-04-0940, April 28, 2006] --- So.3d ---- (Ala.Crim.App.2006). Hinton filed an application for rehearing, which was overruled. He then petitioned this Court for certiorari review.

Hinton's certiorari petition alleges numerous grounds for review, including, among other things, that evidence existed that allegedly proved that he was innocent, that the State failed to disclose certain exculpatory evidence before trial, and that he had been denied the effective assistance of trial counsel.

Because the Court of Criminal Appeals' opinion thoroughly refuted most of Hinton's arguments, we granted the petition as to only one ground-whether Hinton's trial counsel was ineffective in failing to procure a competent firearms-identification expert to testify in Hinton's defense.

Facts

The facts of this case are set out in detail in the Court of Criminal Appeals' opinion on direct appeal. 548 So.2d at 550-53. However, we briefly note the following:

This case involves two murders committed during two separate robberies; there was also a third robbery in which the victim survived. The two murders involved two factually similar robberies committed at fast-food restaurants located in the Birmingham area late at night: in both robberies, the victims, who were working alone closing the restaurants, were shot in the head twice with a .38 caliber handgun and were left in or near the coolers in the restaurants. In the third robbery, the victim was wounded by a gunshot but was able to escape. Hinton was later identified as the gunman in the third robbery, and a .38 caliber revolver was recovered from Hinton's home (hereinafter "the Hinton revolver").

*2 The testimony at trial tended to show that Hinton was the gunman in the third robbery; however, the only evidence linking Hinton to the two murders were forensic comparisons of the bullets recovered from those crime scenes to the Hinton revolver. At trial, the State called as witnesses two forensic examiners, both of whom testified that the bullets recovered from all three crime scenes had been fired from the Hinton revolver.

In rebuttal at trial, the defense presented its own expert witness, Andrew Payne. Payne testified that he had examined each of the bullets recovered from the three robberies and bullets from the Hinton revolver. He concluded that, based on his examination, the

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

bullets recovered from the robberies had *not* been fired from the Hinton revolver.[FN1]

Discussion

Hinton argued in his Rule 32 petition that it was undisputed that a competent firearms-identification expert was required for an effective defense at trial because, he contended, the State's case against him hinged on linking the bullets recovered from the two murders to the Hinton revolver. Hinton argued that his trial counsel knew that a competent expert was indispensable to his case. Hinton argued, however, that his counsel instead retained a retired engineer, Payne, who, Hinton maintained, was not qualified and who was not a competent firearms-identification expert. The State, on the other hand, argued that Payne was indeed qualified and competent.

After reviewing the arguments and the record before us, we conclude that Judge Shaw, in his dissent to the Court of Criminal Appeals' opinion, correctly noted that a determination of this issue is premature:

"After carefully reviewing the briefs and after examining both the record on direct appeal and the Rule 32 record, I am satisfied that there is only one issue that has been properly raised and that merits this Court's intervention-whether, based on the standard set out in *Strickland v. Washington*, 466 U.S. 668 (1984), Hinton's trial counsel rendered ineffective assistance by retaining and proceeding to trial with an *unqualified* firearms witness.

"....

"... I feel that it is premature to reverse the circuit court's judgment [3] because it does not appear to me, after examining the record on direct appeal and the Rule 32 record, that a specific finding as to whether Andrew Payne was a qualified firearms and toolmarks expert has ever been made.... Payne testified that he was a civil engineer with a military background primarily in heavy weapons and ordnance and that he had had limited experience during his career in toolmarks examination of handguns. To say that Payne was soundly discredited at trial on cross-examination by the prosecutor would be an understatement. However, prosecutors successfully challenge the credibility of even qualified expert defense witnesses in many cases and for many reasons. Therefore, to me it is not dispositive that the prosecutor successfully challenged Payne's credibility before the jury. Rather, the dispositive issue is whether Payne was a qualified firearms and toolmarks expert.

*3 "... [T]he trial court never specifically found Payne to be qualified to testify about toolmarks. Likewise, the record of the Rule 32 proceedings also reflects that the circuit court made no specific findings on this question....

"....

"... The circuit court did not address directly the issue whether Payne was qualified to be testifying in the first place. Additionally, although the circuit court noted in passing that Payne had 'been qualified as an expert ballistics witness for several criminal and civil cases in Alabama,' that statement does not necessarily reflect a finding that Payne was qualified to testify as a toolmarks expert in this case....

" '... '

"... It is impossible for me to tell ... whether Payne was really ever found to be qualified to testify in court as a firearms and toolmarks expert.

"If Payne was in fact a qualified firearms and toolmarks expert, even if his qualifications did not necessarily match up with those possessed by the State's experts, then I would affirm the circuit

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

court's judgment denying Rule 32 relief. Sorting out conflicting testimony from qualified experts presented at trial is solely within the province of the jury. Rule 32 is not a mechanism by which those convicted of criminal offenses may argue many years after trial that they now have found better expert witnesses that a newly selected jury should hear. On the other hand, if Payne was not qualified to testify authoritatively as a firearms and toolmarks expert, then, based on the *Strickland v. Washington* standard, I would have no choice but to reverse the circuit court's judgment denying Rule 32 relief on the ground that trial counsel had rendered ineffective assistance to Hinton. It goes without saying that, with knowledge that sufficient funds were available to have a qualified firearms and toolmarks expert, no reasonable criminal defense lawyer would seek out and hire an unqualified firearms witness. Such a lawyer would be charged with the knowledge that in a situation where that witness's testimony was crucial to the pivotal issue in the case, the witness would be subjected to a withering cross-examination that could ultimately result in the complete impeachment of his or her credibility. In addition, based on the evidence presented at trial, if the testimony or the only physical evidence that connected Hinton to the capital murders was, in fact, presented by a witness who was not competent to render an opinion, then it was useless to him in rebutting the opinions of the State's experts, thereby resulting in prejudice under the *Strickland v. Washington* standard.

"....

"This is an extremely important case, not only for Hinton and the families of the victims of these horrendous crimes, but also for the people of Alabama, who must have confidence that the criminal justice system is capable of achieving its ultimate purpose-the fair conviction and punishment of the guilty and the protection of the innocent. It is regrettable that the wheels of justice have turned slowly in this case, from the perspectives of both Hinton and the families of the victims. However, as I noted in my special writing in *Dowdell v. State*, 854 So.2d 1195 (Ala.Crim.App.2002), the orderly processing of cases through the courts is an important value, but it is not the end in itself.

*4 "For these reasons, I would remand this case to the circuit court for a specific finding as to whether Andrew Payne was indeed qualified to testify as an expert firearms and toolmarks examiner based on his knowledge, skill, experience, training, or education. Rule 32.9(d), Ala. R.Crim. P., requires that if an evidentiary hearing is conducted on a Rule 32 petition, '[t]he court shall make specific findings of fact relating to each material issue of fact presented.' A statement of the basis of a circuit court's decision is essential to afford the appellant due process. See, e.g., *Dedeaux v. State*, 976 So.2d 1045 (Ala.Crim.App.2005) (remanded for findings on ineffective-assistance claim); *Crum v. State*, 911 So.2d 34 (Ala.Crim.App.2004) (same); *Cain v. State*, 876 So.2d 1178 (Ala.Crim.App.2003) (same). I would also authorize the circuit court to hold another evidentiary hearing should it deem it necessary.... Because, in my view, Hinton's ineffective-assistance claim turns on whether Payne was a qualified firearms and toolmarks expert, that issue should first be addressed by the circuit court. Until that is done, I do not believe that this case is in the right posture for us to decide one way or the other whether the circuit court exceeded its discretion in denying Rule 32 relief.

FN*3 The same judge presided over both the trial and the Rule 32 proceedings. For clarity, I will refer to the 'trial court' when addressing the trial proceedings and to the 'circuit court' when addressing the Rule 32 proceedings."

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

Hinton, --- So.3d at ---- (citations to record and some footnotes omitted).

We agree with Judge Shaw that "the dispositive issue is whether Payne was a qualified firearms and toolmarks expert" and that in denying Hinton's Rule 32 petition the trial court did not directly rule on "the issue whether Payne was qualified to be testifying in the first place."

The State presents an extensive argument in its brief detailing facts and testimony in the record evidencing that Payne was a qualified and competent expert in firearms identification and suggests that this Court could easily make that determination. However, as Judge Shaw notes, Rule 32.9(d), Ala. R.Crim. P., "requires that if an evidentiary hearing is conducted on a Rule 32 petition, '[t]he court shall make specific findings of fact relating to each material issue of fact presented.' " --- So.3d at ---. Under the facts of this case, it would be premature for this Court to examine this issue without the trial court's first making specific findings. See *Ex parte Grau*, 791 So.2d 345, 346-47 (Ala.2000) (holding that it would be "premature" to examine a claim of ineffective assistance of counsel where the trial court failed to make specific findings of facts under Rule 32.9(d), Ala. R.Crim. P.).[FN2]

The judgment of the Court of Criminal Appeals is reversed as to this issue, and the case is remanded for that court to remand the case for the trial court to enter an order pursuant to Rule 32.9, Ala. R.Crim. P., making specific findings as to whether Andrew Payne was indeed qualified and competent to testify as a firearms-identification expert based on his knowledge, skill, experience, training, or education. "On remand, the trial court *may* conduct such further proceedings or take such other evidence as it deems necessary." *Pardue v. State*, 793 So.2d 838, 846 (Ala.Crim.App.1998) (emphasis added).

*5 REVERSED AND REMANDED.

SEE, LYONS, WOODALL, STUART, BOLIN, PARKER, and MURDOCK, JJ., concur.
SMITH, J., concurs specially.
COBB, C.J., recuses herself.
SMITH, Justice (concurring specially).

I concur in the main opinion. As the main opinion notes, this Court, by granting certiorari review as to only one issue, denied certiorari review as to several other issues raised in the certiorari petition including, among other things, that new ballistics evidence proved that Hinton was innocent.

At Hinton's original trial, experts for the State linked six bullets recovered from the murder scenes and the third shooting to the revolver seized from Hinton's mother's house ("the Hinton revolver"). Hinton's most compelling argument is that his expert witnesses demonstrated at the Rule 32, Ala. R.Crim. P., proceeding that the six bullets could not "be linked to a single weapon." However, the testimony actually established that the experts were unable to determine *whether or not* all six bullets had been fired from the same weapon. Hinton's expert at the Rule 32 proceeding, John Dillon, Jr., stated: "in all six cases I was not able to determine whether or not they were fired by [the Hinton revolver]." The testing was inconclusive, and the experts did not exclude the possibility that the Hinton revolver fired those bullets.

Hinton also claimed that the Hinton revolver "was mechanically incapable" of firing the bullets recovered from the third shooting. Specifically, Hinton's Rule 32 experts testified that those bullets contained a defect produced by a timing problem.[FN3] The Hinton revolver had a timing problem, but the experts were unable to reproduce the markings. This testimony, however, was inconclusive and did not show that the Hinton revolver could not produce the marking. Specifically, the testing to produce the timing error was limited: the experts tested only one cylinder of the gun, and their test consisted of manually holding the

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

gun cylinder out of time with their hands. Additionally, one expert testified that the timing problem found in the Hinton revolver would not always occur.

Although the testimony of Hinton's experts was certainly relevant to the claims in the Rule 32 proceeding, the evidence was inconclusive and did not exclude the possibility that the Hinton revolver fired the bullets. To say that the evidence shows that the bullets cannot "be linked to a single weapon' thus overstates the evidence.

> FN1. During the Rule 32 proceeding, Hinton presented testimony from three expert firearms-identification witnesses. All three witnesses were unable to conclude whether or not the bullets recovered from the robberies had been fired from the Hinton revolver.
>
> FN2. Our decision should not be interpreted as a decision regarding the merits of Hinton's claim regarding this issue.
>
> FN3. "Timing" refers to when the cylinder of a revolver rotates to place a chamber in line with the axis of the forcing cone and barrel of the firearm. When a cylinder chamber is not correctly in line with the forcing cone and barrel, a "timing" problem occurs and distinctive markings can be produced on the projectile when the revolver is fired.

Ala.,2008.
Ex parte Hinton
--- So.2d ----, 2008 WL 4603723 (Ala.)

END OF DOCUMENT

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

APPENDIX C

--- So.2d ----, 2008 WL 5517591 (Ala.Crim.App.)
(Cite as: 2008 WL 5517591 (Ala.Crim.App.))

Only the Westlaw citation is currently available.

NOT YET RELEASED FOR PUBLICATION.

Court of Criminal Appeals of Alabama.

Anthony Ray HINTON

v.

STATE of Alabama.

CR-04-0940.

Dec. 19, 2008.

Opinion on Return to Second Remand Aug. 26, 2011.

Rehearing Denied Oct. 21, 2011.

Background: Defendant petitioned for postconviction relief after his convictions for capital murder and sentences of death were affirmed by the Court of Criminal Appeals, 548 So.2d 547, and the Supreme Court, 548 So.2d 562. The Circuit Court, Jefferson County, Nos. CC-85-3363.10 and CC-85-3364.10,James S. Garrett, J., denied the petition. Defendant appealed. The Court of Criminal Appeals, — So.3d —, affirmed. Defendant filed a petition for certiorari review, which was granted as to one issue. The Supreme Court, — So.3d —, reversed and remanded. On remand, the Circuit Court entered order, finding that witness procured by defense counsel was qualified to testify as a firearms-identification expert.

Holding: On return to second remand, the Court of Criminal Appeals, Kellum, J., held that expert witness procured by defense counsel was not unqualified.

Affirmed.

West Headnotes

[1] Criminal Law 110 ⚿478(1)

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k477 Competency of Experts
110k478 Knowledge, Experience, and Skill
110k478(1) k. In General. Most Cited Cases

Trial court made appropriate findings on remand in determining whether expert witness procured in murder prosecution by defense counsel was qualified and competent to testify as a firearms-identification expert based on his knowledge, skill, experience, training, or education; court thoroughly examined witness's testimony regarding his military career and, from that testimony could determine whether witness had the necessary knowledge, skill, and experience to qualify him as an expert in firearms identification, and whether he had acquired knowledge of firearms and toolmarks examination beyond that of an average layperson.

[2] Criminal Law 110 ⚿478(1)

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k477 Competency of Experts
110k478 Knowledge, Experience, and Skill
110k478(1) k. In General. Most Cited Cases

Criminal Law 110 ⚿481

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k477 Competency of Experts
110k481 k. Determination of Question of Competency. Most Cited Cases

Whether a witness is sufficiently qualified to testify as an expert is a question for the trial court, based on the witness's knowledge, skill, experience, training, or education, and not on another person's opinion of the witness's qualifications.

[3] Criminal Law 110 ⚿478(1)

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k477 Competency of Experts
110k478 Knowledge, Experience, and Skill
110k478(1) k. In General. Most Cited Cases

Whether a witness can be covered with the expert veil depends on his acquired knowledge in a field of endeavor not ventured into by the layman; if that knowledge extends beyond or supersedes that of an ordinary witness, as determined by the trial judge, the witness can become an expert.

[4] Criminal Law 110 ⚿478(1)

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k477 Competency of Experts
110k478 Knowledge, Experience, and Skill
110k478(1) k. In General. Most Cited Cases

An "expert witness" is any person whose opportunity or means of knowledge in a specialized art or science is to some degree better than that found in the average juror or witness.

[5] Criminal Law 110 ⚿478(1)

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k477 Competency of Experts
110k478 Knowledge, Experience, and Skill
110k478(1) k. In General. Most Cited Cases

Witness procured by defense counsel was qualified to testify as expert in field of firearms identification in murder prosecution; although witness had never before compared a bullet recovered from a crime scene to a weapon, witness possessed knowledge of gun barrels, rifling characteristics, and toolmarks beyond that of average layperson, had extensive experience in examining bullets using a comparison microscope, having done so thousands of times, and had gained specific experience during his military career with examining bullets and matching them to certain weapons.

J. Drew Colfax and Bryan A. Stevenson, Montgomery, for appellant.

Troy King, atty. gen., and Corey L. Maze, asst. atty. gen., for appellee.

PER CURIAM.

***1** In accordance with the Alabama Supreme Court's opinion in *Ex parte Hinton*, [Ms. 1051390, October 17, 2008] --- So.3d ---- (Ala.2008), we remand this case to the circuit court for that court to conduct proceedings that are consistent with that opinion. On remand, the circuit court shall take all

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

necessary action to see that the circuit clerk makes due return to this court at the earliest possible time and within 84 days after the release of this opinion. The return to remand shall include the circuit court's written findings of fact; any additional pleadings that are submitted on remand; and a transcript of the remand hearing if the circuit court conducts such a hearing.

REMANDED WITH INSTRUCTIONS.[FN*]

McMILLAN, SHAW, WISE, and WELCH, JJ., concur.

BASCHAB, Presiding Judge, concurring specially.

Because this court is bound by the decisions of the Alabama Supreme Court, I am compelled to concur. However, I would note that, by allowing Payne to testify, the trial court found, at least implicitly, that he was a qualified and competent firearms expert. Therefore, a remand for findings on the issue is a waste of already scarce judicial resources.

On Return to Second Remand

KELLUM, Judge.

In 1986, Anthony Ray Hinton was convicted of two counts of murder made capital because the murders were committed during the course of a robbery. By a vote of 10–2, the jury recommended that Hinton be sentenced to death, and the trial court accepted the jury's recommendation and sentenced Hinton to death. Both this Court and the Alabama Supreme Court affirmed Hinton's convictions and death sentence, *Hinton v. State*, 548 So.2d 547 (Ala.Crim.App.1988), aff'd, 548 So.2d 562 (Ala.1989), and the United States Supreme Court denied certiorari review. *Hinton v. Alabama*, 493 U.S. 969, 110 S.Ct. 419, 107 L.Ed.2d 383 (1989). A thorough statement of the facts is set out in this Court's opinion affirming Hinton's convictions and sentence.

Hinton subsequently filed a timely petition for postconviction relief pursuant Rule 32, Ala. R.Crim. P., challenging his convictions and sentence of death. After conducting an evidentiary hearing, the circuit court denied Hinton's petition in a written order. This Court affirmed that denial on appeal. *Hinton v. State*, [Ms. CR–04–0940, April 28, 2006] — So.3d — (Ala.Crim.App.2006).

The Alabama Supreme Court granted certiorari review as to one issue: Whether Hinton's trial counsel was ineffective for not procuring a qualified firearms-identification expert to testify in Hinton's defense. The Court held that it was premature to address the issue because no specific finding of fact had been made by the circuit court, as required by Rule 32.9, Ala. R.Crim. P., as to whether Andrew Payne, whom trial counsel had procured in Hinton's defense, was, in fact, qualified as an expert in firearms identification. *Ex parte Hinton*, [Ms. 1051390, October 17, 2008] — So.3d — (Ala.2008). The Court quoted then Judge Shaw's [FN1] dissent to this Court's opinion affirming the circuit court's denial of Hinton's Rule 32 petition, in pertinent part, as follows:

" 'After carefully reviewing the briefs and after examining both the record on direct appeal and the Rule 32 record, I am satisfied that there is only one issue that has been properly raised and that merits this Court's intervention—whether, based on the standard set out in *Strickland v. Washington*, 466 U.S. 668 [104 S.Ct. 2052, 80 L.Ed.2d 674] (1984), Hinton's trial counsel rendered ineffective assistance by retaining and proceeding to trial with an *unqualified* firearms witness.

*2 " '....

" '... I feel that it is premature to reverse the circuit court's judgment because it does not appear to me, after examining the record on direct appeal and the Rule 32 record, that a specific finding as to whether Andrew Payne was a qualified firearms and toolmarks expert has ever been made.... Payne testified

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

that he was a civil engineer with a military background primarily in heavy weapons and ordnance and that he had had limited experience during his career in toolmarks examination of handguns. To say that Payne was soundly discredited at trial on cross-examination by the prosecutor would be an understatement. However, prosecutors successfully challenge the credibility of even qualified expert defense witnesses in many cases and for many reasons. Therefore, to me it is not dispositive that the prosecutor successfully challenged Payne's credibility before the jury. Rather, the dispositive issue is whether Payne was a qualified firearms and toolmarks expert.

" '... [T]he trial court never specifically found Payne to be qualified to testify about toolmarks. Likewise, the record of the Rule 32 proceedings also reflects that the circuit court made no specific findings on this question....

" '....

" '... The circuit court did not address directly the issue whether Payne was qualified to be testifying in the first place. Additionally, although the circuit court noted in passing that Payne had "been qualified as an expert ballistics witness for several criminal and civil cases in Alabama," that statement does not necessarily reflect a finding that Payne was qualified to testify as a toolmarks expert in this case....

" '....

" 'If Payne was in fact a qualified firearms and toolmarks expert, even if his qualifications did not necessarily match up with those possessed by the State's experts, then I would affirm the circuit court's judgment denying Rule 32 relief. Sorting out conflicting testimony from qualified experts presented at trial is solely within the province of the jury. Rule 32 is not a mechanism by which those convicted of criminal offenses may argue many years after trial that they now have found better expert witnesses that a newly selected jury should hear. On the other hand, if Payne was not qualified to testify authoritatively as a firearms and toolmarks expert, then, based on the *Strickland v. Washington* standard, I would have no choice but to reverse the circuit court's judgment denying Rule 32 relief on the ground that trial counsel had rendered ineffective assistance to Hinton. It goes without saying that, with knowledge that sufficient funds were available to have a qualified firearms and toolmarks expert, no reasonable criminal defense lawyer would seek out and hire an unqualified firearms witness. Such a lawyer would be charged with the knowledge that in a situation where that witness's testimony was crucial to the pivotal issue in the case, the witness would be subjected to a withering cross-examination that could ultimately result in the complete impeachment of his or her credibility. In addition, based on the evidence presented at trial, if the testimony or the only physical evidence that connected Hinton to the capital murders was, in fact, presented by a witness who was not competent to render an opinion, then it was useless to him in rebutting the opinions of the State's experts, thereby resulting in prejudice under the *Strickland v. Washington* standard.' "

Ex parte Hinton, — So.3d at — (quoting *Hinton v. State*, [Ms. CR-04-0940, April 28, 2006] — So.3d —, — (Ala.Crim.App.2006) (Shaw, J., dissenting) (footnote omitted)). The Supreme Court then reversed this Court's judgment and remanded the case for this Court to remand the case "for the trial court to enter an order pursuant to Rule 32.9, Ala. R.Crim. P., making specific findings as to whether Andrew Payne was indeed qualified and competent to testify as a firearms-identification expert based on his knowledge, skill, experience, training, or education." *Ex parte Hinton*, — So.3d at —.

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

*3 On December 19, 2008, this Court remanded this case to the circuit court for proceedings consistent with the Alabama Supreme Court's opinion. *Hinton v. State*, — So.3d —— (Ala.Crim.App.2008) (opinion after remand from the Alabama Supreme Court). The circuit court then conducted a hearing and issued a written order purporting to comply with the Supreme Court's opinion and submitted its return to remand. This Court permitted the parties to file briefs on return to remand. After carefully examining the parties' briefs, the proceedings on remand, and the circuit court's order on remand, this Court concluded that the circuit court had failed to comply with the Alabama Supreme Court's opinion. Instead of "making specific findings as to whether Andrew Payne was indeed qualified and competent to testify as a firearms-identification expert based on his knowledge, skill, experience, training, or education," *Ex parte Hinton*, — So.3d at ——, the circuit court appeared to disagree with the Supreme Court's conclusion that no finding had been made regarding whether Payne was qualified as an expert in firearms identification and issued a written order quoting various portions of the transcript from Hinton's trial and the transcript from the evidentiary hearing on Hinton's Rule 32 petition and concluding that the original trial judge who had presided over Hinton's trial and the initial Rule 32 proceedings had, indeed, found Payne to be a qualified expert, albeit implicitly.[FN2] The circuit court made no independent findings of fact regarding whether Payne was qualified as an expert in firearms identification.

Thereafter, this Court remanded this case a second time by order for the circuit court to comply with the Supreme Court's opinion and to make specific findings as to whether Payne was qualified to testify as a firearms-identification expert. On second remand, the circuit court complied with the Supreme Court's opinion and issued a written order finding that Payne was, in fact, a qualified expert in firearms identification and submitted its return to second remand. In its order on return to second remand, the circuit court made the following findings:

"The court makes the following findings of fact from the trial testimony:

"1) During his service in the Air Force Mr. Payne was an instructor in the gunnery program and worked on 'development research of guns' (R–DA. 1573);

*4 "2) Throughout his 30 year career with the Air Force, Mr. Payne was involved with the design of gun barrels (R–DA. 1574–75);

"3) During his Air Force Career Mr. Payne was involved with the testing of firearms and bullets on a daily basis (R–DA. 1575);

"4) During his Air Force career he examined bullets fired from machine guns and examined bullets fired from handguns on a regular basis (R–DA. 1576);

"5) During the 1950's he served on the weapons evaluation board of the Air Force and examined fired bullets approximately 6000 times (R–DA. 1576);

"6) He worked at the Pentagon as the 'technical assistant to the deputy chief of staff for research and technology' which included research and design of all weapons, non nuclear (R–DA. 1577);

"7) He was a member of the American Academy of Forensic Sciences through which he received all publications of the criminalistics branch which included firearms identification (R–DA. 1578–79, 1642–43);

"8) Throughout his career he learned how 'barrels and bullets put toolmarks on one another' (R–DA.

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

1577);

"9) Prior to his examination of Hinton's gun he had viewed bullets under a comparison microscope 'thousands' of times (R–DA. 1601);

"10) Throughout his career he spent much of his time matching ammunition back to a particular gun barrel. Even more specifically Payne had spent six to nine months of his career involved 100 per cent of the time 'specifically matching a projectile to a barrel' (R–DA. 1641–42); and

"11) Payne had previously been qualified as an expert witness in both civil and criminal courts in Jefferson County. (R–DA. 1577; 1654–55).

"Therefore, based on the ... law, which was in effect at the time of Mr. Hinton's trial [FN3] and the findings of fact from that trial this Court finds and therefore rules that Mr. Andrew Payne was an expert witness when he testified during said trial in September 1986 due to the fact that he clearly had more experience and knowledge in the area of firearms and toolmarks comparisons than that of the average lay witness or juror."

(Record on Return to Second Remand "RTR2", C. 5–6.) [FN4] This Court then allowed the parties to file supplemental briefs on return to second remand.

" '[W]hen the facts are undisputed and an appellate court is presented with pure questions of law, that court's review in a Rule 32 proceeding is *de novo*.' *Ex parte White*, 792 So.2d 1097, 1098 (Ala.2001). 'However, where there are disputed facts in a postconviction proceeding and the circuit court resolves those disputed facts, "[t]he standard of review on appeal ... is whether the trial judge abused his discretion when he denied the petition." ' *Boyd v. State*, 913 So.2d 1113, 1122 (Ala.Crim.App.2003) (quoting *Elliott v. State*, 601 So.2d 1118, 1119 (Ala.Crim.App.1992))."

Bryant v. State, [Ms. CR–08–0405, February 4, 2011] — So.3d —, — (Ala.Crim.App.2011).

*5 [1] On appeal, Hinton first contends that the circuit court, on second remand, again failed to comply with the Alabama Supreme Court's instructions because, he says, the circuit court did no more than list Payne's experience and then "summarily conclude[ ]" that he was an expert "because he knew more about firearms than the average lay person." (Hinton's supplemental brief on return to second remand, ("RTR2 brief"), at p. 23.) However, we conclude that the circuit court's order on second remand complies with the Alabama Supreme Court's instructions to "mak[e] specific findings as to whether Andrew Payne was indeed qualified and competent to testify as a firearms-identification expert based on his knowledge, skill, experience, training, or education." *Ex parte Hinton*, — So.3d at —. The circuit court thoroughly examined Payne's testimony regarding his military career and, from that testimony, determined that Payne had the necessary knowledge, skill, and experience to qualify him as an expert in firearms identification. In addition, as explained below, the circuit court applied the proper standard—the standard in effect at the time of Hinton's trial—in making its determination, i.e., whether Payne had acquired knowledge of firearms and toolmarks examination beyond that of an average layperson.

[2] Hinton also contends on appeal that the circuit court failed to address in its findings the evidence he presented at the Rule 32 hearing from his firearms-identification experts, from the State's firearms-identification experts, and from his trial counsel, regarding Payne's alleged lack of qualifications in firearms and toolmarks examination. However, contrary to Hinton's contention, the opinion of other witnesses as to whether Payne was qualified as a firearms-identification expert is irrelevant. " 'Whether a witness is sufficiently qualified to testify as an expert is a question for the trial court....' " *Arthur v. State*,

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

711 So.2d 1031, 1064 (Ala.Crim.App.1996), aff'd, 711 So.2d 1097 (Ala.1997) (quoting *Bailey v. State*, 574 So.2d 1001, 1003 (Ala.Crim.App.1990)). As explained below, whether a witness is qualified as an expert is based on the witness's knowledge, skill, experience, training, or education, and not on another person's opinion of the witness's qualifications.

Finally, Hinton contends that the circuit court erred in finding that Payne was qualified as a firearms-identification expert. He argues that Payne's own testimony, as well as then Judge Shaw's dissent and then Judge Cobb's dissent to this Court's original opinion affirming the denial of Hinton's Rule 32 petition, shows that Payne's expertise was in heavy ordnance and artillery, and not in firearms identification, and that Payne had only limited experience "matching bullets to a barrel" and "*no experience* comparing a bullet recovered from a crime scene to a handgun for forensic identification purposes." (Hinton's RTR2 brief, at p. 33.) He also argues that Payne's lack of qualifications is evidenced by Payne's alleged incompetent examination of the bullets at issue in this case. According to Hinton, Payne used "outdated and inappropriate equipment," dropped a bullet, did not know how to use the comparison microscope provided to him at the Alabama Department of Forensic Sciences' ("DFS") laboratory, and failed to test-fire the weapon at issue which, Hinton claims, is an "absolutely essential" step in firearms identification. (Hinton's RTR2 brief, at pp. 35–36.) [FN5]

Hinton's arguments are unpersuasive. Moreover, the circuit court's findings are supported by the record. At Hinton's trial, Payne testified that he was a consulting engineer and that he had received a civil-engineering degree from Tulane University in 1933. Payne testified that he had joined the United States Air Force in the 1940s and that he was on active duty for four years as an instructor in the gunnery program. After leaving active duty, Payne continued employment with the Air Force in reserve status, first serving as "supervisor and chief engineer of the flexible gunnery engineering division," which included working on bombs and fuses and ensuring that "the guns that the Air [Force] used were kept state of the art." (DA, R. 1573.) Also during his service, Payne worked in research and development of non-nuclear weapons, served as director of the technical-services laboratory, served as director of the armament-development laboratory, was on a "weapons evaluation board" for the Air Force (DA, R. 1576), and at one point was "technical assistant to the deputy chief of staff for research and technology" for "all weapons, non-nuclear." (DA, R. 1577.)

*6 Payne testified that, during his entire time with the Air Force, he was involved with the design of gun barrels and that he tested and examined firearms and bullets fired from guns "almost on a daily basis." (R. 1575.) According to Payne, he spent the majority of his career dealing with heavy ordnance and examining bullets from such weapons as machine guns, but that "in the 1950's," when he was on the weapons-evaluation board, he examined "all the weapons which were in the arsenal of the Air Force," including handguns. (DA, R. 1576.) Payne stated that he had examined bullets five or six thousand times in his career, and that he had used a comparison microscope to compare bullets thousands of times. He also stated that he had examined and compared bullets to weapons barrels to determine which weapon they had come from and that he had, in fact, spent 100 percent of his time for approximately nine months of his career doing nothing but examining bullets in an effort to match them to weapons. [FN6]

Payne also testified extensively regarding his familiarity with toolmarks on bullets and how they are placed there, with the manufacturing process of gun barrels and the rifling characteristics left on the barrels as a result of that process, and with the corrosive effect of various types of primers used in bullets on the rifling characteristics of gun barrels. He also thoroughly explained to the jury, using actual bullets and slides of actual bullets, how to make comparisons of bullets

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

based on their toolmarks and how such comparisons can be impacted by deformities in the bullet. Payne further said that he had previously been qualified in court as an expert in firearms identification.

[3][4] At the time of Hinton's trial, "[t]he criterion for admission of expert testimony [was] that the witness, by study, practice, experience or observation as to the particular subject, [had] acquired knowledge beyond that of an ordinary witness." *Meade v. State*, 390 So.2d 685, 693 (Ala.Crim.App.1980). "Whether a witness can be covered with the expert veil depends on his acquired knowledge in a field of endeavor not ventured into by the layman. If that knowledge extends beyond or supersedes that of an ordinary witness, as determined by the trial judge, the witness can become an expert." *Cobb v. State*, 50 Ala.App. 707, 710, 282 So.2d 327, 329 (Ala.Crim.App.1973). As explained in *Charles v. State*, 350 So.2d 730 (Ala.Crim.App.1977):

> "An 'expert witness' is one who can enlighten a jury more than the average man in the street. *Woods v. State*, 54 Ala.App. 591, 310 So.2d 891 (1975). A witness can be qualified as an expert if his knowledge extends beyond or supercedes that of an ordinary witness. *Cobb v. State*, 50 Ala.App. 707, 282 So.2d 327 (1973); *Nesbitt v. State*, 55 Ala.App. 534, 317 So.2d 501, cert. denied, 294 Ala. 766, 317 So.2d 504 (1975). An 'expert witness' is one who is shown, either by training or experience, to be better informed than the hypothetical average juror. *Ward v. State*, 44 Ala.App. 229, 206 So.2d 897, cert. denied, 281 Ala. 650, 206 So.2d 922 (1966[1967]). An expert witness, by definition, is any person whose opportunity or means of knowledge in a specialized art or science is to some degree better than that found in the average juror or witness. *Frazier v. State*, 40 Ala.App. 67, 112 So.2d 212, cert. denied, 269 Ala. 696, 112 So.2d 218 (1959)."
>
> *7 350 So.2d at 733.

[5] In this case, it is evident from Payne's testimony that he had acquired knowledge in the field of firearms identification beyond that of an ordinary witness or juror. Although he had not spent his entire career engaged in firearms identification, as did the State's expert witnesses, Payne clearly possessed knowledge of gun barrels, rifling characteristics, and toolmarks beyond that of an average layperson. He had extensive experience in examining bullets using a comparison microscope, having done so thousands of times. Payne also gained specific experience during his career with examining bullets and matching them to certain weapons. Contrary to Hinton's contention, merely because Payne had never before compared "a bullet recovered from a crime scene" to a weapon in no way renders Payne unqualified to do so. (Hinton's RTR2 brief, at p. 33.) Indeed, Hinton has cited no authority, and we have found none, that requires a witness to have previously worked on a criminal case in order to be qualified as a firearms-identification expert in a criminal case.

In addition, although Hinton alleges that Payne's examination of the bullets in this case was incompetent, we do not find that Payne's actions during his examination rendered him unqualified as an expert. Hinton is correct that when Payne came to the DFS laboratory, he brought with him calipers, a magnifying glass, and a scale, all traditionally old-school instruments. However, Payne testified that he used those instruments to measure and weigh the bullets. He used the comparison microscope provided by DFS to perform the microscopic examination of the bullets, from which he came to his conclusion that the bullets from the crimes were not fired from the gun recovered from Hinton's mother. Additionally, Hinton is also correct that Payne did not test-fire the gun at issue during his examination. Rather, Payne used something much more damning to the State's case to reach his conclusion—the State's own test-fired bullets. Furthermore, although it is clear from the record that Payne required assistance in using the comparison microscope at the

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

DFS laboratory, Payne specifically testified that he had never used that particular brand—American Optical—of comparison microscopes. As this Court noted in its original opinion affirming the circuit court's denial of Hinton's Rule 32 petition, even one of the State's own firearms-identification experts testified during his deposition for the Rule 32 proceedings that such assistance would be necessary, stating that "on the scope we had at that time, unless you were familiar with *that model*, you would need someone familiar with it to show you." (R32, C. 2210; emphasis added.) Finally, the fact that Payne dropped a bullet while at the DFS laboratory in no way affects his qualifications as an expert.

After reviewing the record, we cannot say that the circuit court abused its discretion in finding that Payne was qualified as an expert in firearms identification. As the Alabama Supreme Court noted in quoting then Judge Shaw's dissent to this Court's original opinion affirming the circuit court's denial of Hinton's Rule 32 petition:

> *8 " 'If Payne was in fact a qualified firearms and toolmarks expert, even if his qualifications did not necessarily match up with those possessed by the State's experts, then I would affirm the circuit court's judgment denying Rule 32 relief. Sorting out conflicting testimony from qualified experts presented at trial is solely within the province of the jury. Rule 32 is not a mechanism by which those convicted of criminal offenses may argue many years after trial that they now have found better expert witnesses that a newly selected jury should hear....' "

Ex parte Hinton, — So.3d at — (quoting *Hinton v. State*, [Ms. CR–04–0940, April 28, 2006] — So.3d —, — (Ala.Crim.App.2006) (Shaw, J., dissenting)). Because Payne was a qualified expert in firearms identification, even if his qualifications did not match those of the State's experts, Hinton's claim that his trial counsel was ineffective for not procuring a qualified firearms-identification expert is meritless and his Rule 32 petition was properly denied on this ground by the circuit court.[FN2]

Based on the foregoing, the judgment of the circuit court is affirmed.

AFFIRMED.

WELCH, P.J., and WINDOM, BURKE, and JOINER, JJ., concur.

FN* Note from the reporter of decisions: On March 23, 2009, the trial court responded to the remand order. On April 1, 2009, the Court of Criminal Appeals set aside the trial court's submission on remand, and on August 13, 2010, the Court of Criminal Appeals again remanded the case to the circuit court, by order.

FN1. Judge Shaw is now an Associate Justice on the Alabama Supreme Court.

FN2. The circuit judge who presided over Hinton's trial also conducted the initial evidentiary hearing on Hinton's Rule 32 petition and issued the initial written order denying Hinton's petition. However, that judge retired while Hinton's case was on appeal and a different circuit judge inherited the case on remand.

FN3. Rule 1103, Ala. R. Evid., provides, in relevant part, that "these rules shall apply if the proceeding begins on or after January 1, 1996." Because Hinton's trial occurred some 10 years before the Alabama Rules of Evidence became effective, those rules are inapplicable here.

FN4. References to the record on return to

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

second remand will be to "RTR2," references to the record from Hinton's initial Rule 32 proceedings will be to "R32," and references to the record from Hinton's direct appeal will be to "DA."

FN5. Hinton also appears to argue that because the State discredited Payne at trial and then "exploited" Payne's lack of credibility, he could not have been an expert. (Hinton's RTR2 brief, at p. 41.) However, as the Supreme Court noted in *Ex parte Hinton*:

" '[P]rosecutors successfully challenge the credibility of even qualified expert defense witnesses in many cases and for many reasons. Therefore, ... it is not dispositive that the prosecutor successfully challenged Payne's credibility before the jury.' "

--- So.3d at --- (quoting *Hinton v. State*, [Ms. CR-04-0940, April 28, 2006] --- So.3d ---, --- (Ala.Crim.App.2006) (Shaw, J., dissenting))

FN6. Because Payne had, in fact, examined and compared bullets and/or ordnance fragments to barrels to determine which weapon they had come from, this case is materially distinguishable from *Bowden v. State*, 610 So.2d 1256, 1258 (Ala.Crim.App.1992), on which Hinton relies, in which this Court found no abuse of discretion on the part of the trial court in refusing to allow a defense witness to testify as an expert in firearms identification where the witness had never before "compared a shell of unknown origin with any particular weapon."

FN7. We note that in *Wilson v. Greene*, 155 F.3d 396 (4th Cir.1998), the United States Court of Appeals for the Fourth Circuit examined whether a criminal defendant was entitled to the effective assistance of a mental-health expert and recognized that no such constitutional right exists. The Court explained:

"The Constitution does not entitle a criminal defendant to the effective assistance of an expert witness. To entertain such claims would immerse federal judges in an endless battle of the experts to determine whether a particular psychiatric examination was appropriate. See *Harris v. Vasquez*, 949 F.2d 1497, 1518 (9th Cir.1990); *Silagy v. Peters*, 905 F.2d 986, 1013 (7th Cir.1990). Furthermore, it would undermine the finality of state criminal convictions, which would constantly be subject to psychiatric reappraisal years after the trial had ended. *Harris*, 949 F.2d at 1517-18; *Silagy*, 905 F.2d at 1013."

155 F.3d at 401. This Court has followed the rationale of *Wilson* in differing circumstances involving mental-health experts. See *Burgess v. State*, 962 So.2d 272 (Ala.Crim.App.2005) (upholding circuit court's denial of postconviction petitioner's request for funds to hire a mental-health expert where petitioner had three such experts at his original trial and there was no evidence that the standards in *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), had not been met), and *Nicks v. State*, 783 So.2d 895 (Ala.Crim.App.1999) (upholding denial of claim in postconviction petition that petitioner had been denied due process under *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), where petitioner had three mental-health experts at trial). Likewise, at least four of our sister

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

states have followed the rationale of *Wilson* regarding mental-health experts. See *Walls v. State*, 926 So.2d 1156 (Fla.2006); *State v. Leonard*, 157 Ohio App.3d 653, 813 N.E.2d 50 (2004); *Brown v. State*, 798 So.2d 481 (Miss.2001); and *Turpin v. Bennett*, 270 Ga. 584, 513 S.E.2d 478 (1999). Although these cases involved only mental-health experts, by finding in *Ex parte Hinton* that the dispositive issue in this case is whether Payne was a qualified firearms and toolmarks examiner, the Alabama Supreme Court, at least implicitly, extended the *Wilson* rationale to other experts.

Ala.Crim.App.,2008.
Hinton v. State
--- So.2d ----, 2008 WL 5517591 (Ala.Crim.App.)

END OF DOCUMENT

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

APPENDIX D

2012 WL 5458542
Only the Westlaw citation is currently available.

NOT YET RELEASED FOR PUBLICATION.

Supreme Court of Alabama.

Ex parte Anthony Ray HINTON.
(In re Anthony Ray Hinton
v.
State of Alabama).

1110129. | Nov. 9, 2012.

Synopsis

Background: After his capital murder convictions and death sentence were affirmed on direct appeal, defendant petitioned for postconviction relief. The Circuit Court, Jefferson County, Nos. CC–85–3363.10 and CC–85–3364.10, James S. Garrett, J., denied petition. The Court of Criminal Appeals affirmed, — So.3d —. Defendant's petition for certiorari review was granted.

Holding: The Supreme Court, Parker, J., held that trial court's determination as to witness's qualifications to testify as an expert was based on cold trial record such that the decision was subject to de novo review.

Reversed and remanded.

Shaw, J., concurred in result but issued statement of nonrecusal.

Opinion

PARKER, Justice.

*1 Anthony Ray Hinton petitioned the Jefferson Circuit Court ("the circuit court") for relief under Rule 32, Ala. R.Crim. P., arguing that his trial counsel had provided ineffective assistance of counsel by failing to provide a qualified expert in his defense at his capital-murder trial. The circuit court denied Hinton's Rule 32 petition on the basis that Andrew Payne, the expert retained by defense counsel, was qualified to testify as a firearms-identification expert at Hinton's trial. Hinton appealed to the Court of Criminal Appeals; the Court of Criminal Appeals, after remanding twice for the circuit court to address the issue, affirmed the circuit court's denial of Hinton's petition. *Hinton v. Alabama*, [Ms. CR–04–0940, December 19, 2008] — So.3d — (Ala.Crim.App.2006) (opinion on return to second remand). Hinton then petitioned this Court for a writ of certiorari to review the Court of Criminal Appeals' decision. We granted certiorari review to determine whether the Court of Criminal Appeals applied the correct standard of review in affirming the circuit court's denial of Hinton's Rule 32 petition.

In its opinion on return to second remand, the Court of Criminal Appeals summarized the relevant procedural history and facts in this case:

"In 1986, Anthony Ray Hinton was convicted of two counts of murder made capital because the murders were committed during the course of a robbery. By a vote of 10–2, the jury recommended that Hinton be sentenced to death, and the trial court accepted the jury's recommendation and sentenced Hinton to death. Both this Court and the Alabama Supreme Court affirmed Hinton's convictions and death sentence, *Hinton v. State*, 548 So.2d 547 (Ala.Crim.App.1988), aff'd, 548 So.2d 562 (Ala.1989), and the United States Supreme Court denied certiorari review. *Hinton v. Alabama*, 493 U.S. 969, 110 S.Ct. 419, 107 L.Ed.2d 383 (1989). A thorough statement of the facts is set out in this Court's opinion affirming Hinton's convictions and sentence.

"Hinton subsequently filed a timely petition for postconviction relief pursuant Rule 32, Ala. R.Crim. P., challenging his convictions and sentence of death. After conducting an evidentiary hearing, the circuit court denied Hinton's petition in a written order. This Court affirmed that denial on appeal. *Hinton v. State*, [Ms. CR–04–0940, April 28, 2006] — So.3d — (Ala.Crim.App.2006).

"The Alabama Supreme Court granted certiorari review as to one issue: Whether Hinton's trial counsel was ineffective for not procuring a qualified firearms-identification expert to testify in Hinton's defense. The Court held that it was premature to address the issue because no specific finding of fact had been made by the circuit court, as required by Rule 32.9, Ala. R.Crim. P., as to whether Andrew Payne, whom trial counsel had procured in Hinton's defense, was, in fact, qualified as an expert in firearms identification. *Ex parte Hinton*, [Ms. 1051390, October 17, 2008] — So.3d — (Ala.2008). The Court quoted then Judge Shaw's [1] dissent to this Court's opinion affirming the circuit court's

denial of Hinton's Rule 32 petition, in pertinent part, as follows:

*2 " ' "After carefully reviewing the briefs and after examining both the record on direct appeal and the Rule 32 record, I am satisfied that there is only one issue that has been properly raised and that merits this Court's intervention—whether, based on the standard set out in *Strickland v. Washington*, 466 U.S. 668 [104 S.Ct. 2052, 80 L.Ed.2d 674] (1984), Hinton's trial counsel rendered ineffective assistance by retaining and proceeding to trial with an *unqualified* firearms witness.

" ' "....

" ' "... I feel that it is premature to reverse the circuit court's judgment because it does not appear to me, after examining the record on direct appeal and the Rule 32 record, that a specific finding as to whether Andrew Payne was a qualified firearms and toolmarks expert has ever been made.... Payne testified that he was a civil engineer with a military background primarily in heavy weapons and ordnance and that he had had limited experience during his career in toolmarks examination of handguns. To say that Payne was soundly discredited at trial on cross-examination by the prosecutor would be an understatement. However, prosecutors successfully challenge the credibility of even qualified expert defense witnesses in many cases and for many reasons. Therefore, to me it is not dispositive that the prosecutor successfully challenged Payne's credibility before the jury. Rather, the dispositive issue is whether Payne was a qualified firearms and toolmarks expert.

" ' "... [T]he trial court never specifically found Payne to be qualified to testify about toolmarks. Likewise, the record of the Rule 32 proceedings also reflects that the circuit court made no specific findings on this question....

" ' "....

" ' "... The circuit court did not address directly the issue whether Payne was qualified to be testifying in the first place. Additionally, although the circuit court noted in passing that Payne had 'been qualified as an expert ballistics witness for several criminal and civil cases in Alabama,' that statement does not necessarily reflect a finding that Payne was qualified to testify as a toolmarks expert in this case....

" ' "....

" ' "If Payne was in fact a qualified firearms and toolmarks expert, even if his qualifications did not necessarily match up with those possessed by the State's experts, then I would affirm the circuit court's judgment denying Rule 32 relief. Sorting out conflicting testimony from qualified experts presented at trial is solely within the province of the jury. Rule 32 is not a mechanism by which those convicted of criminal offenses may argue many years after trial that they now have found better expert witnesses that a newly selected jury should hear. On the other hand, if Payne was not qualified to testify authoritatively as a firearms and toolmarks expert, then, based on the *Strickland v. Washington* standard, I would have no choice but to reverse the circuit court's judgment denying Rule 32 relief on the ground that trial counsel had rendered ineffective assistance to Hinton. It goes without saying that, with knowledge that sufficient funds were available to have a qualified firearms and toolmarks expert, no reasonable criminal defense lawyer would seek out and hire an unqualified firearms witness. Such a lawyer would be charged with the knowledge that in a situation where that witness's testimony was crucial to the pivotal issue in the case, the witness would be subjected to a withering cross-examination that could ultimately result in the complete impeachment of his or her credibility. In addition, based on the evidence presented at trial, if the testimony or the only physical evidence that connected Hinton to the capital murders was, in fact, presented by a witness who was not competent to render an opinion, then it was useless to him in rebutting the opinions of the State's experts, thereby resulting in prejudice under the *Strickland v. Washington* standard." '

*3 "*Ex parte Hinton*, — So.3d at — (quoting *Hinton v. State*, [Ms. CR–04–0940, April 28, 2006] — So.3d —, — (Ala.Crim.App.2006) (Shaw, J., dissenting) (footnote omitted)). The Supreme Court then reversed this Court's judgment and remanded the case for this Court to remand the case 'for the trial court to enter an order pursuant to Rule 32.9, Ala. R.Crim. P., making specific findings as to whether Andrew Payne was indeed qualified and competent to testify as a firearms-identification expert based on his knowledge, skill, experience, training, or education.' *Ex parte Hinton*, — So.3d at —.

"On December 19, 2008, this Court remanded this case to the circuit court for proceedings consistent with the Alabama Supreme Court's opinion. *Hinton v. State*, [Ms. CR-04-0940, December 19, 2008] — So.3d — (Ala.Crim.App.2008) (opinion after remand from the Alabama Supreme Court). The circuit court then conducted a hearing and issued a written order purporting to comply with the Supreme Court's opinion and submitted its return to remand. This Court permitted the parties to file briefs on return to remand. After carefully examining the parties' briefs, the proceedings on remand, and the circuit court's order on remand, this Court concluded that the circuit court had failed to comply with the Alabama Supreme Court's opinion. Instead of 'making specific findings as to whether Andrew Payne was indeed qualified and competent to testify as a firearms-identification expert based on his knowledge, skill, experience, training, or education,' *Ex parte Hinton*, —So.3d at —, the circuit court appeared to disagree with the Supreme Court's conclusion that no finding had been made regarding whether Payne was qualified as an expert in firearms identification and issued a written order quoting various portions of the transcript from Hinton's trial and the transcript from the evidentiary hearing on Hinton's Rule 32 petition and concluding that the original trial judge who had presided over Hinton's trial and the initial Rule 32 proceedings had, indeed, found Payne to be a qualified expert, albeit implicitly.[2] The circuit court made no independent findings of fact regarding whether Payne was qualified as an expert in firearms identification.

"Thereafter, this Court remanded this case a second time by order for the circuit court to comply with the Supreme Court's opinion and to make specific findings as to whether Payne was qualified to testify as a firearms-identification expert. On second remand, the circuit court complied with the Supreme Court's opinion and issued a written order finding that Payne was, in fact, a qualified expert in firearms identification and submitted its return to second remand. In its order on return to second remand, the circuit court made the following findings:

" 'The court makes the following findings of fact from the trial testimony:

" '1) During his service in the Air Force Mr. Payne was an instructor in the gunnery program and worked on "development research of guns";

*4 " '2) Throughout his 30 year career with the Air Force, Mr. Payne was involved with the design of gun barrels;

" '3) During his Air Force Career Mr. Payne was involved with the testing of firearms and bullets on a daily basis;

" '4) During his Air Force career he examined bullets fired from machine guns and examined bullets fired from handguns on a regular basis;

" '5) During the 1950's he served on the weapons evaluation board of the Air Force and examined fired bullets approximately 6000 times;

" '6) He worked at the Pentagon as the "technical assistant to the deputy chief of staff for research and technology" which included research and design of all weapons, non-nuclear;

" '7) He was a member of the American Academy of Forensic Sciences through which he received all publications of the criminalistics branch which included firearms identification;

" '8) Throughout his career he learned how "barrels and bullets put toolmarks on one another";

" '9) Prior to his examination of Hinton's gun he had viewed bullets under a comparison microscope "thousands" of times;

" '10) Throughout his career he spent much of his time matching ammunition back to a particular gun barrel. Even more specifically Payne had spent six to nine months of his career involved 100 per cent of the time "specifically matching a projectile to a barrel"; and

" '11) Payne had previously been qualified as an expert witness in both civil and criminal courts in Jefferson County.

" 'Therefore, based on the ... law, which was in effect at the time of Mr. Hinton's trial[3] and the findings of fact from that trial this Court finds and therefore rules that Mr. Andrew Payne was an expert witness when he testified during said trial in September 1986 due to the fact that he clearly had more experience and knowledge in the area of firearms and toolmarks comparisons than that of the average lay witness or juror.'

" [1] Judge Shaw is now an Associate Justice on the Alabama Supreme Court.

" [2] The circuit judge who presided over Hinton's trial also conducted the initial evidentiary hearing on Hinton's Rule 32 petition and issued the initial written order denying Hinton's petition. However, that judge retired while Hinton's case was on appeal and a different circuit judge inherited the case on remand.

" [3] Rule 1103, Ala. R. Evid., provides, in relevant part, that 'these rules shall apply if the proceeding begins on or after January 1, 1996.' Because Hinton's trial occurred some 10 years before the Alabama Rules of Evidence became effective, those rules are inapplicable here."

Hinton, — So.3d at —— (references to the record omitted).

Applying an "abuse-of-discretion" standard of review, which this Court refers to as an "exceeds-its-discretion" standard, see *CIT Commc'n Fin. Corp. v. McFadden, Lyon & Rouse, L.L.C.*, 37 So.3d 114, 121 n. 5 (Ala.2009), the Court of Criminal Appeals concluded that the circuit court did not exceed "its discretion in finding that Payne was qualified as an expert in firearms identification." — So.3d at ——.

*5 Before this Court, Hinton, claiming conflict with *Jackson v. Strickland*, 808 So.2d 993 (Ala.2001), and *Eldridge v. Loftis*, 723 So.2d 562, 564 (Ala.1998), argues that the Court of Criminal Appeals "erred in reviewing the circuit court's findings for abuse of discretion where the circuit court's findings were based solely on a review of the appellate record." Hinton's brief, at p. 6. Hinton also argues that "Alabama law is well-settled that where a trial court does not receive evidence ore tenus, but instead makes its judgment based on the cold trial record, no presumption of correctness applies to the trial court's conclusions and the appellate court must review the evidence de novo." Hinton's brief, at p. 6.

In the present case, the circuit court did indeed base its determination that Payne was qualified to testify as an expert upon the "cold trial record." As a result, it was in no better position than was an appellate court to make the determination it made. Accordingly, the Court of Criminal Appeals erred in applying the abuse-of-discretion standard of review. We reverse its judgment and remand the case to the Court of Criminal Appeals for it to apply a de novo standard of review in reviewing the circuit court's judgment that Payne was qualified to testify as a firearms-identification expert.

REVERSED AND REMANDED.

MALONE, C.J., and WOODALL, STUART, BOLIN, and MURDOCK, JJ., concur.

SHAW, J., concurs in the result.

MAIN and WISE, JJ., recuse themselves. *

SHAW, Justice (statement of nonrecusal).

*5 I was a member of the Court of Criminal Appeals when it issued its April 28, 2006, opinion in *Hinton v. State*, [Ms. CR–04–0940, April 28, 2006] —So.3d —— (Ala.Crim.App.2006). I dissented as to any holding on the issue whether Anthony Ray Hinton's trial counsel was ineffective for not procuring a qualified firearms-identification expert to testify in Hinton's defense, because I believed that the issue was not properly before the court:

> "Because, in my view, [the] ineffective-assistance claim turns on whether [Andrew] Payne was a qualified firearms and toolmarks expert, that issue should first be addressed by the circuit court. Until that is done, I do not believe that this case is in the right posture for us to decide one way or the other whether the circuit court exceeded its discretion in denying Rule 32[, Ala. R.Crim. P.,] relief."

— So.3d at ——. I did not dissent because I disagreed with the court's decision on whether the trial court had erred; instead, I declined to review the trial court's judgment on this issue until a determination had been made by the trial court as to whether Andrew Payne was a firearms-identification expert. I expressed no opinion as to whether Hinton was entitled to relief under Rule 32, and I expressed no opinion as to whether Payne was in fact qualified.

The Alabama Supreme Court subsequently granted certiorari review as to the issue whether Hinton's trial counsel was ineffective for not procuring a qualified firearms-identification expert and agreed "that it was premature to address the issue because no specific finding of fact had

been made by the circuit court, as required by Rule 32.9, Ala. R.Crim. P., as to whether Andrew Payne, whom trial counsel had procured in Hinton's defense, was, in fact, qualified as an expert in firearms identification." *Hinton v. State*, [CR-04-0940, Dec. 19, 2008] — So.3d —, — (Ala.Crim.App.2006) (opinion on return to second remand) (citing *Ex parte Hinton*, [Ms. 1051390, October 17, 2008] — So.3d —, (Ala.2008)). A decision on the issue has *now* been rendered by the trial court. Although no party has asked me to step aside, I must determine whether, as an Associate Justice of the Alabama Supreme Court, I may sit in this case, given that it was previously before me when I was a judge on the Court of Criminal Appeals.

*6 "The law of recusal reflects two fundamental judicial policies: First, it is the duty of a judge to decide cases. Second, a judge should be a neutral, or impartial, decision-maker." *Dunlop Tire Corp. v. Allen*, 725 So.2d 960, 976 (Ala.1998) (See, J., statement of nonrecusal). I am required by my oath of office and by the Alabama Constitution to decide the cases before me. See Ala. Const.1901, § 139(a) (Off. Recomp., formerly Amend. 328, § 6.01(a)) ("[T]he judicial power of the state shall be vested exclusively in a unified judicial system which shall consist of a supreme court...."); Ala. Const.1901, § 279 (requiring "all officers, executive and judicial, ... [to] take the following oath or affirmation: 'I, _____, solemnly swear ... that I will support the Constitution of the United States, and the Constitution of the State of Alabama ...; and that I will faithfully and honestly discharge the duties of the office upon which I am about to enter' "); and *Federated Guar. Life Ins. Co. v. Bragg*, 393 So.2d 1386, 1389 (Ala.1981) (" '[I]t is the duty of the judge to adjudicate the decisive issues involved in the controversy ... and to make binding declarations concerning such issues, thus putting the controversy to rest....' " (quoting 26 C.J.S. *Declaratory Judgements* § 161 (1956), pp. 374–75)).

I note that Canon 3C(1), Ala. Canons of Jud. Ethics, states: "A judge should disqualify himself in a proceeding in which his disqualification is required by law or his impartiality might reasonably be questioned...." Further, Ala.Code 1975, § 12–1–13, provides:

> "No justice of the Supreme Court or judge of a Court of Appeals of Alabama shall participate in the decision of any case in the Supreme Court or a court of appeals appealed to said court from any lower court of the State of Alabama, of which lower court said justice was judge at the time said case was decided and who presided at the trial of said case in said lower court."

This Code section, by its plain language, forbids an appellate court judge from participating in a case in which that judge "presided at the trial of [the] case in [the] lower court." It cannot apply to a Justice of the Supreme Court sitting in a case appealed from either of our courts of intermediate appeals, because judges on those courts do not "preside" over "*trials*." Stated differently, the Code section does not forbid a Justice of the Supreme Court, who was previously a member of one of the intermediate courts of appeals, from participating in a case that was before him or her when the Justice was a member of that lower appellate court, because the Code section forbids participation in a case only where the Justice, as a member of a "lower court" "*presided at the trial* " of the case. Thus, § 12–1–13, on its face, does not forbid my participation in the instant case.

Section 12–1–13 is similar to 28 U.S.C. § 47, which states: "No judge shall hear or determine an appeal from the decision of a case or issue tried by him." In describing this federal law, applicable to judges of the federal courts of appeals, it has been stated:

> *7 "To say the least, it would be unbecoming for a judge to sit in a United States Court of Appeals to participate in the determination of the correctness, propriety and appropriateness of what he did in the trial of the case. After rendering decisions, some judges remain open minded, and some are unreluctant to confess previous error, but a reasonable person has a reasonable basis to question the impartiality of a judge who sits in a United States Court of Appeals to review his own decision as a trial judge."

Rice v. McKenzie, 581 F.2d 1114, 1117 (4th Cir.1978). The principle that a judge must recuse himself or herself in an appeal where the judge ruled in the case while a member of a lower court has been held not to apply if the issue on appeal is different from the issue ruled upon below. See generally *Delaney v. United States*, 263 U.S. 586, 589, 44 S.Ct. 206, 68 L.Ed. 462 (1924) (holding that a former district court

judge serving on the court of appeals was not disqualified from sitting on a case where "there was no question before the circuit court of appeals that had been considered by [the judge] in the District Court"); *United States v. Perlstein*, 126 F.2d 789, 806 (3d Cir.1942) (holding that a former district court judge sitting on an appeal before the circuit court of appeals was not disqualified because "no ruling or action of [the judge] ... is in any way involved by the present appeal to this court"); and *Lee v. United States*, 91 F.2d 326, 332 (5th Cir.1937) (holding that the statute prohibiting a judge before whom a cause was tried in the district court from sitting on an appeal to the court of appeals did not apply because the question considered and decided by the judge in the district court "was not presented on this appeal at all"). See also *Poorman v. Commonwealth*, 782 S.W.2d 603, 605–06 (Ky.1989) (holding that "the major premise that a 'judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned' " and not sit in review of a case previously decided by him "must be given common-sense application" and did not apply to that judge now sitting on a higher court where there "was no issue on appeal directly or indirectly involving" the judge's prior decision on the lower court).

Participation in the instant case does not involve a determination of the correctness, propriety, or appropriateness of what I did as a member of the Court of Criminal Appeals in *Hinton v. State*, because we are now faced with an issue that had not been decided by the trial court in the case that was before the Court of Criminal Appeals while I was serving on that court. My impartiality cannot be questioned because I am not called upon to review my prior decision—the issue whether Payne was qualified was not before me then, as the Supreme Court confirmed in *Ex parte Hinton*, and I expressed no opinion as to it.

Footnotes

* Justice Main and Justice Wise were members of the Court of Criminal Appeals when that court considered this case.

© 2013 Thomson Reuters. No claim to original U.S. Government Works.

APPENDIX E

--- So.3d ---, 2013 WL 598122 (Ala.Crim.App.)
(Cite as: 2013 WL 598122 (Ala.Crim.App.))

H

Only the Westlaw citation is currently available.

NOT YET RELEASED FOR PUBLICATION.

Court of Criminal Appeals of Alabama.
Anthony Ray HINTON
v.
STATE of Alabama.

CR-04-0940.
Feb. 15, 2013.

Background: After his capital murder convictions and death sentence were affirmed on direct appeal, 548 So.2d 547, defendant petitioned for postconviction relief. The Circuit Court, Jefferson County, Nos. CC-85-3363.10 and CC-85-3364.10, James S. Garrett, J., denied petition. The Court of Criminal Appeals affirmed, — So.2d —. On certiorari review, the Alabama Supreme Court reversed. On return to second remand, the Court of Criminal Appeals, — So.2d —, affirmed. On certiorari review, the Supreme Court, — So.3d —, reversed and remanded.

Holding: On remand, the Court of Criminal Appeals, Kellum, J., held that witness was qualified to testify as a firearms-identification expert, even if his qualifications did not match those of the State's experts.

Affirmed.

West Headnotes

Criminal Law 110 ⚿478(1)

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k477 Competency of Experts
110k478 Knowledge, Experience, and Skill
110k478(1) k. In General. Most Cited Cases

Witness was qualified to testify as an expert in field of firearms identification in murder prosecution, even if his qualifications did not match those of the State's experts.

After Remand by the Alabama Supreme Court

KELLUM, Judge.

***1** In 1986, Anthony Ray Hinton was convicted of two counts of capital murder and was sentenced to death. This Court and the Alabama Supreme Court affirmed Hinton's convictions and sentence on appeal. *Hinton v. State*, 548 So.2d 547 (Ala.Crim.App.1988) (" *Hinton I* "), aff'd, 548 So.2d 562 (Ala.1989) (" *Hinton II* "). In 1990, Hinton filed a Rule 32, Ala. R.Crim. P., petition for postconviction relief, in which he alleged, among other things, that his trial counsel had been ineffective for not hiring a qualified firearms-identification expert for his defense. After an evidentiary hearing, the circuit court denied Hinton's petition in 2005, finding, in relevant part, that Hinton's trial counsel had not been ineffective for not hiring a qualified firearms-identification expert because counsel had hired Andrew Payne to examine the evidence and to testify in his defense. This Court affirmed the denial of Hinton's petition on appeal, adopting the circuit court's finding. *Hinton v. State*, [Ms. CR-04-0940, April 28, 2006] — So.3d — (Ala.Crim.App.2006) (" *Hinton III* ").

On certiorari review, the Alabama Supreme Court reversed this Court's judgment, holding that it was premature to address the issue whether trial counsel

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

had been ineffective for not hiring a qualified firearms-identification expert because no specific finding of fact had been made by the circuit court, as required by Rule 32.9, Ala. R.Crim. P., as to whether Andrew Payne, whom trial counsel had procured in Hinton's defense, was, in fact, qualified as an expert in firearms identification. *Ex parte Hinton*, [Ms. 1051390, October 17, 2008] — So.3d — (Ala.2008) (" *Hinton IV* "). The Court then remanded the case for this Court to remand the case "for the trial court to enter an order pursuant to Rule 32.9, Ala. R.Crim. P., making specific findings as to whether Andrew Payne was indeed qualified and competent to testify as a firearms-identification expert based on his knowledge, skill, experience, training, or education." *Hinton IV*, — So.3d at —. We note that while this case was pending on appeal, the circuit judge who had ruled on Hinton's Rule 32 petition and who had also presided over Hinton's original trial retired from the bench, and a different circuit judge was assigned to the case.

In accordance with the Alabama Supreme Court's instructions, this Court remanded this case for the circuit court "to conduct proceedings that are consistent with [the Supreme Court's] opinion." *Hinton v. State*, [Ms. CR-04-0940, December 19, 2008] — So.3d — (Ala.Crim.App.2008) (opinion after remand from the Alabama Supreme Court) (" *Hinton V* "). On remand, the circuit court failed to comply with the Alabama Supreme Court's instructions; it did not make specific findings of fact regarding whether Andrew Payne was a qualified firearms-identification expert. Therefore, this Court remanded this case a second time, by order, for the circuit court to comply with the Alabama Supreme Court's opinion in *Hinton IV*. On second remand, the circuit court complied with the Supreme Court's opinion and issued a written order finding that Andrew Payne was, in fact, a qualified expert in firearms identification. This Court then affirmed the circuit court's judgment, holding that "[a]fter reviewing the record, we cannot say that the circuit court abused its discretion in finding that Payne was qualified as an expert in firearms identification" and that "[b]ecause Payne was a qualified expert in firearms identification, even if his qualifications did not match those of the State's experts, Hinton's claim that his trial counsel was ineffective for not procuring a qualified firearms-identification expert is meritless and his Rule 32 petition was properly denied on this ground by the circuit court." *Hinton v. State*, [Ms. CR-04-0940, August 26, 2011] — So.3d —, — (Ala.Crim.App.2011) (opinion on return to second remand) (" *Hinton VI* ").

***2** On certiorari review, the Alabama Supreme Court again reversed this Court's judgment, this time holding that this Court had erred in applying an abuse-of-discretion standard of review in reviewing the circuit court's finding that Andrew Payne was a qualified firearms-identification expert because the circuit court's finding had been based on "the 'cold trial record' " and, thus, the circuit court "was in no better position than was an appellate court to make the determination it made." *Ex parte Hinton*, [Ms. 1110129, November 9, 2012] — So.3d —, — (Ala.2012) (" *Hinton VII* "). The Court then remanded this case to this Court for us "to apply a de novo standard of review in reviewing the circuit court's judgment that Payne was qualified to testify as a firearms-identification expert." *Hinton VII*, — So.3d at —.

In accordance with the Alabama Supreme Court's instructions, we have "review [ed] the circuit court's judgment that Payne was qualified to testify as a firearms-identification expert" under "a de novo standard of review," and we hold that the circuit court did not err in finding that Payne was qualified as an expert in firearms identification. See *Hinton VI*, in which this Court detailed the qualifications of Andrew Payne as gleaned from the record, set out the law in effect at the time of Hinton's trial, and explained why Payne was qualified as an expert in firearms identification. Therefore, the judgment of the circuit court is affirmed.

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

AFFIRMED.

WINDOM, P.J., and WELCH, BURKE, and JOINER, JJ., concur.

Ala.Crim.App.,2013.
Hintony v. State
--- So.3d ----, 2013 WL 598122 (Ala.Crim.App.)

END OF DOCUMENT

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

C' 'JRT OF CRIMINAL APPE .S
STATE OF ALABAMA

D. Scott Mitchell
Clerk
Gerri Robinson
Assistant Clerk

P. O. Box 301555
Montgomery, AL 36130-1555
(334) 229-0751
Fax (334) 229-0521

April 26, 2013

CR-04-0940 **Death Penalty**

Anthony Ray Hinton v. State of Alabama (Appeal from Jefferson Circuit Court: CC85-3363.10; CC85-3364.10)

NOTICE

You are hereby notified that on April 26, 2013, the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

D. Scott Mitchell

D. Scott Mitchell, Clerk
Court of Criminal Appeals

cc: Hon. Laura Petro, Circuit Judge
Hon. Anne-Marie Adams, Circuit Clerk
J. Drew Colfax, Attorney
Charlotte Morrison, Attorney
Bryan A. Stevenson, Attorney
Aaryn M. Urell, Attorney
Jon Brennan Hayden, Asst. Atty. Gen.
Corey Landon Maze, Asst. Attorney General

APPENDIX F

IN THE SUPREME COURT OF ALABAMA

April 19, 2013

1110129

Ex parte Anthony Ray Hinton. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Anthony Ray Hinton v. State of Alabama) (Jefferson Circuit Court: CC-85-3363.10; CC-85-3364.10; Criminal Appeals : CR-04-0940).

CERTIFICATE OF JUDGMENT

WHEREAS, the petition for writ of certiorari in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on April 19, 2013:

Writ Denied. No Opinion. Parker, J. - Stuart, Bolin, and Bryan, JJ., concur. Moore, C.J., and Murdock, and Shaw, JJ., dissent. Main and Wise, JJ., recuse themselves.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 19th day of April, 2013.

Robert G. Esdale

Clerk, Supreme Court of Alabama

OPPOSITION BRIEF

ORIGINAL

Supreme Court, U.S.
FILED
NOV 13 2013
OFFICE OF THE CLERK

No. 13-6440
CAPITAL CASE

In the
Supreme Court of the United States

ANTHONY RAY HINTON,
Petitioner,
v.
STATE OF ALABAMA,
Respondent.

On Petition for a Writ of Certiorari to the
Alabama Court of Criminal Appeals

BRIEF IN OPPOSITION

LUTHER STRANGE
Alabama Attorney General

Andrew Brasher
Deputy Solicitor General
*Counsel of Record

Lauren A. Simpson
Assistant Attorney General

OFFICE OF ALA. ATT'Y GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 353-2609
abrasher@ago.state.al.us

November 13, 2013

RECEIVED
NOV 15 2013
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CAPITAL CASE

QUESTION PRESENTED
(Restated)

Whether Hinton's Sixth Amendment right to the effective assistance of counsel was violated when his trial attorney hired as an expert witness in firearm and toolmark examination an independent consultant who was a member of the American Academy of Forensic Sciences, had decades of experience with firearms and bullets through the United States Air Force, and had significant experience examining fired bullets and matching fired ammunition to particular weapons.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT 2

A. The murders 2

B. The trial and direct appeal 4

C. Post-conviction proceedings 7

REASONS WHY THE PETITION SHOULD BE DENIED 14

I. Hinton's claim is factbound and meritless 14

A. Alabama courts deemed Andrew Payne, Jr., a qualified expert witness 14

B. Trial counsel was not deficient for hiring a qualified expert witness 20

C. The Alabama Court of Criminal Appeals properly applied Strickland when it found that Hinton's claim of ineffective assistance of counsel was meritless 22

II. There is no need for error correction because Hinton can raise his ineffective assistance claim in federal habeas proceedings 25

CONCLUSION 27

TABLE OF AUTHORITIES

Cases

Boyles v. Dougherty,
No. 1120395 (Ala. Sept. 27, 2013) 15

Ex parte Hinton,
548 So. 2d 562 (Ala. 1989) 7

Ex parte Hinton (Pet. App. B),
No. 1051390 (Ala. Oct. 17, 2008) 11, 18–19, 24–25

Ex parte Hinton (Pet. App. D),
No. 1110129 (Ala. Nov. 9, 2012) 13

Ex parte Hinton (Pet. App. F),
No. 1110129 (Ala. Apr. 19, 2013) 13, 19, 24

Hinton v. Alabama,
493 U.S. 969 (1989) 7

Hinton v. State,
548 So. 2d 547 (Ala. Crim. App. 1988) 2–4, 7

Hinton v. State (Pet. App. A),
No. CR-04-0940 (Ala. Crim. App. Apr. 28, 2006) 1, 8–10, 16–18, 21, 23–24

Hinton v. State (Pet. App. C),
No. CR-04-0940 (Ala. Crim. App. Aug. 26, 2011) 12–13, 19–20

Hinton v. State (Pet. App. E),
No. CR-04-0940 (Ala. Crim. App. Feb. 15, 2013) 13, 19, 25

Hopkinson v. Shillinger,
866 F.2d 1185 (10th Cir. 1989) 25

Meade v. State,
390 So. 2d 685 (Ala. Crim. App. 1980) 12, 15, 22

Revis v. State,
101 So. 3d 247 (Ala. Crim. App. 2011) 15

Strickland v. Washington,
466 U.S. 668 (1984) 1, 22–24

Wilson v. Greene,
155 F.3d 396 (4th Cir. 1998) 19

Filings and Court Orders

Brief of Appellant, Hinton v. State,
No. CR-04-0940 (Ala. Crim. App. Apr. 28, 2006) 23

Brief of Appellee, Hinton v. State,
No. CR-04-0940 (Ala. Crim. App. Apr. 28, 2006) 9

Order of Aug. 13, 2010, Hinton v. State,
No. CR-04-0940 (Ala. Crim. Ap. Apr. 28, 2006) 11

Order on Remand, Hinton v. State,
Nos. CC-1985-3363.60, -3364.60
(Cir. Ct. Jefferson County Mar. 10, 2009) 11, 15–16

Order on Remand, Hinton v. State,
Nos. CC-1985-3363.60, -3364.60
(Cir. Ct. Jefferson County Sept. 1, 2010) 12, 19

Statutes

28 U.S.C. § 2254(d) 26

Rules

ALA. R. CRIM. P. 32.1(e) 10, 21

ALA. R. CRIM. P. 32.2(c) 23

ALA. R. CRIM. P. 32.7(d) 23

ALA. R. EVID. 702 15

INTRODUCTION

Anthony Hinton was convicted of two counts of capital murder for shooting night managers at Birmingham restaurants and robbing the store safes. His trial counsel, after diligently searching for a firearm and toolmark expert who would work on the limited budget counsel believed he had, hired Andrew Payne, Jr., a consulting engineer who had studied firearms and projectiles and had previously been qualified as an expert ballistics witness in Alabama.[1] Payne testified that the projectiles recovered from the murder scenes did not match the revolver found in Hinton's home, but the jury believed the State's two expert witnesses and convicted Hinton. More than fifteen years later, Hinton proffered the testimony of three additional firearm and toolmark experts on post-conviction review and alleged that his trial counsel was ineffective for hiring Payne.

The issue Hinton presents is factbound and meritless. Every court to consider his claim has found that Payne was a qualified expert witness. Aside from the fact that Hinton failed to present this issue to the circuit court or the Alabama Court of Criminal Appeals in accordance with the strictures of Alabama Rule of Criminal Procedure 32, both courts found that there had been no violation of *Strickland v. Washington* in Payne's hiring. Hinton is

---

1. Pet. App. A at 39.

simply attempting to use this Court to substitute new experts for the qualified expert he had at trial, and in so doing circumvent the jury's finding of guilt. As there is no issue here worthy of certiorari, this Court should deny review in this matter.

STATEMENT OF THE CASE

A. The murders

If not for his third victim's quick thinking, Hinton's string of robbery-murders might have gone unsolved.

Two strikingly similar robbery-murders occurred at Birmingham restaurants in February and July 1985. In each case, the night manager was discovered inside the restaurant's cooler, shot twice in the head with a .38 caliber weapon. There were no signs of forced entry, and the victims' belongings were untouched, but the restaurants' safes had been emptied.[2] The projectiles recovered from the first victim, John Davidson, were delivered to David Higgins, a firearm and toolmark examiner with the Alabama Department of Forensic Sciences (DFS).[3] Those recovered from the second

---

2. *Hinton v. State*, 548 So. 2d 547, 550–51 (Ala. Crim. App. 1988).
3. *See* R. 1201, 1203, 1205–06. Citations to the record on appeal are as follows:
   Transcript on direct appeal: R.
   Transcript on Rule 32 appeal: R32.

victim, Thomas Wayne Vason, were given to Higgins's colleague at DFS, Lawden Yates.[4]

Shortly after midnight on July 25, night manager Sidney Smotherman was closing up at a Quincy's Family Steak House in Bessemer, a city just southwest of Birmingham. Two other employees went with him to a nearby grocery store, where one noticed a "strange looking guy" who was not shopping, kept attempting to hide his face, and followed Smotherman out.[5]

As Smotherman began to drive home, a car bumped his from the rear. When Smotherman and the other driver got out to survey the damage, the man pointed a gun at him, forced Smotherman into the other car, and drove them back to Quincy's. At the restaurant, the gunman ordered Smotherman to give him everything out of the safe except the pennies. Once Smotherman complied, the gunman asked him where the cooler was located, then told him to go inside. Remembering the two murders, Smotherman asked if he could be put into a storage room instead of the cooler, as it was warmer. Once inside, Smotherman ducked as the gunman fired twice, then kicked the door shut, locking the gunman out of the storage room. Ten minutes later,

---

4. *See* R. 1263, 1266.
5. *Hinton*, 548 So. 2d at 551–52.

Smotherman escaped and called the police. As before, the two spent projectiles were sent to Yates at DFS.[6]

Smotherman gave police a detailed description of the robber, helped construct a composite drawing of the suspect, and quickly picked Hinton out of a photographic array. One of Smotherman's coworkers also identified Hinton as the man who had been following Smotherman at the grocery store.[7]

On July 31, police arrested Hinton at his home, where he lived with his mother. A sergeant asked Hinton's mother if she had a gun in the house. When she opened a kitchen drawer to retrieve it, she found the gun missing. She then went into a bedroom and returned with a .38 caliber Smith & Wesson revolver, which she gave to the officers along with two cartridges taken from the gun. The revolver was given to DFS.[8]

B. The trial and direct appeal

The State called David Higgins and Lawden Yates as expert witnesses. Both men were veteran firearm and toolmark examiners,[9] and they agreed that all six crime scene projectiles matched those test-fired from the Hinton revolver.[10]

---

6. *Id.* at 552.
7. *Id.* at 552–53.
8. *Id.* at 553.
9. R. 1195–99, 1259–61.
10. R. 1233–34, 1272–73, 1282.

The defense, in turn, called Andrew Payne, Jr.[11] After being educated as a civil engineer, Payne joined the Air Corps in 1942, then went into the gunnery program, where he eventually served as an instructor and as the chief engineer of the flexible gunnery engineering division.[12] During his tenure with the Air Force, Payne was involved with the design of gun barrels and the testing of firearms and bullets, and he acted as the project officer for the .60 caliber machine gun.[13] Payne testified that he worked for the Air Force at the Pentagon, where he was the technical assistant to the deputy chief of staff for research and technology, overseeing all non-nuclear weapons.[14] He had also become a member of the American Academy of Forensic Science in the course of his career.[15] Prior to Hinton's trial, Payne had been qualified as an expert in firearm identification twice and had given an opinion regarding toolmarks and toolmark identification.[16]

In conducting his analysis, Payne acquired six bullets that he believed had been fired through the Hinton revolver.[17] He also relied upon *Firearms Identification* by J. Howard Matthews, which he stated was a widely used

---

11. R. 1571.
12. R. 1572–73.
13. R. 1574–75.
14. R. 1577.
15. R. 1578.
16. R. 1577–78, 1654.
17. R. 1585.

reference book for people in his field.[18] Payne testified that he had used comparison microscopes to examine bullets thousands of times.[19]

Payne explained that the Hinton revolver was forty to fifty years old.[20] At the time that the gun was manufactured, the common primers used in bullets were chlorate primers, which deposited corrosive salts in gun barrels. Over time, barrels could rust and toolmarks could be obliterated.[21] Upon examining the revolver, Payne concluded that corrosive ammunition had been used in that gun, as the toolmarks were "substantially dulled" and holes had been eaten into the barrel.[22]

Payne made two examinations of the revolver and examined the projectiles using DFS's equipment.[23] He found no match between any of the crime scene projectiles and the test bullets, nor did he conclude that any of the crime scene projectiles had been fired from the revolver.[24]

On cross-examination, Payne testified that he had matched spent ordnance to a particular barrel "perhaps for a period there of six to eight or nine months a hundred percent."[25] He also admitted that he was unfamiliar

---

18. R. 1697–98.
19. R. 1601.
20. R. 1612.
21. R. 1613–14, 1617.
22. R. 1616, 1618.
23. R. 1622, 1633–34.
24. R. 1637.
25. R. 1641.

with DFS's comparison microscope and had to ask Yates how to operate it.[26] He did not know whether he would be compensated for his work in Hinton's case, explaining that the defense attorney, Sheldon Perhacs, had told him that he did not know whether the funds would be available.[27] The prosecutor concluded by pointing out that Payne only had one eye.[28]

The jury convicted Hinton of two counts of capital murder after less than three hours of deliberation.[29] During the sentencing phase, the jury voted 10–2 for the death penalty on both counts.[30] Judge James Garrett sentenced Hinton in accordance with the jury's advisory recommendation.[31]

On direct appeal, the Alabama Court of Criminal Appeals affirmed the judgment and sentence of the trial court.[32] The Supreme Court of Alabama also affirmed.[33] This Court denied certiorari in 1989.[34]

C. Post-conviction proceedings

Aided by new counsel, Hinton filed a petition for post-conviction relief pursuant to Rule 32 of the Alabama Rules of Criminal Procedure on August

---

26. R. 1650–51.
27. R. 1656.
28. R. 1667.
29. R. 1858–61.
30. R. 1897–1901.
31. R. 1962.
32. *Hinton v. State*, 548 So. 2d 547 (Ala. Crim. App. 1988).
33. *Ex parte Hinton*, 548 So. 2d 562 (Ala. 1989).
34. *Hinton v. Alabama*, 493 U.S. 969 (1989).

15, 1990.[35] Among other claims, Hinton contended that the bullets recovered from the three crime scenes could not be linked to a single gun or to the revolver his mother produced.[36] As evidence, Hinton's counsel took the depositions of Higgins and Yates, who stated that they had poor opinions of Payne and that they compared evidence in their cases.[37] Counsel also presented testimony from Lannie Emanuel and Raymond Cooper, firearm and toolmark examiners from the Southwestern Institute of Forensic Science, and from John H. Dillon, Jr., a self-employed forensic consultant.[38] Emanuel concluded that the Davidson bullets were fired from the same gun, but stated that he could not determine whether the Vason or Smotherman bullets had been fired from that gun. He also noted dissimilarities between the recovered projectiles and the test bullets.[39] Cooper reached similar conclusions, admitting that he could not determine whether any of the bullets had been fired from the Hinton revolver.[40] Finally, Dillon, like Emanuel and Cooper, concluded that the Davidson bullets were fired from the same gun, but stated that there were insufficient marks on the Vason and Smotherman bullets to

---

35. Pet. App. A at 16.
36. *Id.* at 23.
37. *Id.* at 25–26.
38. *Id.* at 26–29.
39. *Id.* at 26–27.
40. *Id.* at 28.

make that determination. He also stated that he could not determine whether any of the bullets had come from the Hinton revolver.[41]

After an evidentiary hearing, Judge Garrett denied the petition in 2005.[42] He noted in particular the vague responses Hinton's three new experts offered:

> At the evidentiary hearing, Hinton presented the testimony of three ballistics experts: Lannie G. Emanuel, Raymond E. Cooper, and John Dillon. All three experts testified that the projectiles recovered from John Davidson's body were fired from the same weapon. All three experts testified that they were unable to determine whether or not all six projectiles recovered from the three crime scenes were fired from the same weapon; rather, their testing was inconclusive. Also, all three experts testified that they were unable to determine whether or not all six projectiles were fired from the weapon recovered from Hinton's mother's home; rather, that their results were inconclusive. In other words, these expert witnesses could not exclude the possibility that Hinton's gun fired those six projectiles.
>
> Hinton did not present evidence proving that the recovered projectiles were not fired from the gun recovered at his mother's house. Rather, Hinton's experts testified that while they could not make a conclusive match between the six projectiles and his weapon, they could not exclude the possibility that those projectiles were fired from that weapon. Therefore, this is not

---

41. *Id.* at 29.

42. *Id.* at 16. The fifteen-year delay was due to a number of factors. Hinton's first Rule 32 attorney withdrew one week before the hearing on April 15, 1991, necessitating a continuance. Hinton's second Rule 32 attorney filed an amended petition on March 14, 1994, and a second amended petition on November 6, 1998. Two additional attorneys from the Equal Justice Initiative filed notices of appearance on June 2, 1999. The circuit court set the case for hearing on March 22, 2002, but Hinton's new counsel filed a third amended petition four weeks before, and the hearing was reset for June. The circuit court dismissed the third amended petition on January 18, 2005. (*See, e.g.*, Br. Appellee at 4–8, Hinton v. State, No. CR-04-0940 (Ala. Crim. App. Apr. 28, 2006).)

> new evidence exonerating Hinton. At trial, Hinton presented expert testimony that excluded the possibility that the six projectiles were fired from the weapon recovered from his mother's house. As a result, this latest expert testimony is less persuasive of innocence than the expert testimony presented at trial.
>
> Because this expert testimony presented at the evidentiary hearing was offered for the same purpose as the expert testimony at Hinton's trial, this expert testimony is cumulative to the evidence that was presented at trial. Also, because this expert testimony was less compelling of innocence than the expert testimony presented at trial, this evidence would not have changed the outcome of the verdict and it amounts merely to impeachment evidence. Accordingly, this claim is dismissed because it does not meet the requirements of newly discovered material facts under Rule 32.1(e) and because this evidence does not prove that Hinton is innocent of the crimes for which he was convicted.[43]

The Alabama Court of Criminal Appeals concurred with the circuit court in 2006.[44] That court noted that Hinton's new experts' testimony "was not as favorable to the defense" as the expert testimony he presented at trial, as his new experts "carefully phrased their answers" and "discussed the limitations on their testing." Moreover, the Court of Criminal Appeals wrote that Judge Garrett, who "observed the witnesses and, on several occasions, asked them very specific questions about their testing and conclusions," was best suited to determining their credibility.[45]

---

43. Pet. App. A at 29 (internal citations omitted).
44. *Id.* at 31.
45. *Id.* at 30.

The Supreme Court of Alabama granted certiorari solely on the issue of whether Hinton's trial counsel "was ineffective in failing to procure a competent firearms-identification expert."[46] That court then reversed and remanded the matter in 2008 for the circuit to court to make specific findings as to whether Andrew Payne was qualified and competent to testify as an expert.[47]

On remand in 2009, the circuit court, now presided over by Judge Laura Petro,[48] concluded that Judge Garrett considered Payne to be an expert.[49] The Court of Criminal Appeals determined that a second remand was necessary, however, and directed the circuit court to produce specific findings of fact as to Payne's qualifications.[50] In 2010, Judge Petro did as instructed, listed eleven items regarding Payne's experience, and concluded that Payne was an expert witness "due to the fact that he clearly had more experience and knowledge in the area of firearms and toolmarks comparisons

---

46. Pet. App. B. at 2.
47. *Id.* at 5.
48. By 2009, Judge Garrett had moved out of state. (Order on Remand, Hinton v. State, Nos. CC-1985-3363.60, -3364.60 (Cir. Ct. Jefferson County Mar. 10, 2009).)
49. *Id.* at 2 ("While Judge Garrett never [waved] a legal wand and specifically said at any point during the trial that Mr. Payne was an expert, all of the evidence points to the fact that he allowed him to testify as such.").
50. Order of Aug. 13, 2010, Hinton v. State, No. CR-04-0940 (Ala. Crim. App. Apr. 28, 2006).

than that of the average lay witness or juror."[51] In so doing, she relied on the standard for expert testimony at the time of Hinton's trial: "'that the witness, by study, practice, experience or observation as to the particular subject, [had] acquired knowledge beyond that of an ordinary witness.'"[52]

After supplemental briefing, the Court of Criminal Appeals affirmed on return to second remand in 2011.[53] That court explained why it disagreed with Hinton's contention that Payne was unqualified:

> [A]lthough Hinton alleges that Payne's examination of the bullets in this case was incompetent, we do not find that Payne's actions during his examination rendered him unqualified as an expert. Hinton is correct that when Payne came to the DFS laboratory, he brought with him calipers, a magnifying glass, and a scale, all traditionally old-school instruments. However, Payne testified that he used those instruments to measure and weigh the bullets. He used the comparison microscope provided by DFS to perform the microscopic examination of the bullets, from which he came to his conclusion that the bullets from the crimes were not fired from the gun recovered from Hinton's mother. Additionally, Hinton is also correct that Payne did not test-fire the gun at issue during his examination. Rather, Payne used something much more damning to the State's case to reach his conclusion—the State's own test-fired bullets. Furthermore, although it is clear from the record that Payne required assistance in using the comparison microscope at the DFS laboratory, Payne specifically testified that he had never used that particular brand—American Optical—of comparison microscopes. As this Court noted in its original opinion affirming the circuit court's denial of Hinton's

51. Order on Remand at 2, Hinton v. State, Nos. CC-1985-3363.60, -3364.60 (Cir. Ct. Jefferson County Sept. 1. 2010).

52. Pet. App. C at 8 (quoting *Meade v. State*, 390 So. 2d 685, 693 (Ala. Crim. App. 1980)). As the Court of Criminal Appeals noted, the Alabama Rules of Evidence did not go into effect until January 1, 1996. (*Id.* at 9 n.3.)

53. *Id.* at 9.

> Rule 32 petition, even one of the State's own firearms-identification experts testified during his deposition for the Rule 32 proceedings that such assistance would be necessary, stating that "on the scope we had at that time, unless you were familiar with *that model*, you would need someone familiar with it to show you." Finally, the fact that Payne dropped a bullet while at the DFS laboratory in no way affects his qualifications as an expert.[54]

For a second time, however, the Supreme Court of Alabama reversed and remanded in 2012, holding that the Court of Criminal Appeals should have reviewed the evidence de novo rather than reviewing the circuit court's findings for abuse of discretion.[55] The Court of Criminal Appeals again affirmed in 2013,[56] and the Supreme Court of Alabama denied certiorari.[57]

The present petition to this Court followed.[58]

---

54. *Id.* at 8–9 (internal citation omitted, emphasis in original).
55. Pet. App. D at 5.
56. Pet. App. E at 2.
57. Pet. App. F.
58. On October 21, 2013, the Constitution Project filed an amicus brief in support of Hinton.

REASONS THE PETITION SHOULD BE DENIED

Hinton's petition is not worthy of certiorari. His meritless claim is entirely factbound, and his Sixth Amendment right to counsel was in no way violated by his trial counsel's decision to retain Andrew Payne, Jr., as an expert witness. The Alabama courts properly reviewed and dismissed his claims, and there is no reason for this Court to grant the writ.

I. Hinton's claim is factbound and meritless.

Hinton's claim is not certworthy because it is factbound and, in the end analysis, meritless. On the particular facts of this case, no Sixth Amendment violation occurred.

A. Alabama courts deemed Andrew Payne, Jr., a qualified expert witness.

No matter what Hinton's counsel's reasons were for hiring Payne, every court to consider the matter has found that Payne was qualified to serve as an expert witness in firearm and toolmark examination under the evidentiary rules in place at the time of Hinton's trial.

Alabama's current evidentiary rule concerning expert testimony, Alabama Rule of Evidence 702,[59] largely follows Rule 702 of the Federal Rules of Evidence. Prior to 1996, however, "[t]he criterion for admission of expert testimony [was] that the witness, by study, practice, experience or observation as to the particular subject, has acquired a knowledge beyond that of an ordinary witness."[60] Then as now, "[w]hether a witness is shown to possess the requisite qualifications to be called as an expert is a preliminary question largely within the discretion of the trial courts."[61]

In Hinton's case, the trial court clearly considered Payne to be qualified. Although he never specifically declared Payne an expert on the record, Judge Garrett never made that declaration regarding *any* expert witness, including the two DFS examiners presented by the State.[62] In fact, Judge Petro wrote that the State's expert witnesses "were qualified and

---

59. Adopted effective January 1, 1996, Rule 702 was amended effective January 1, 2012, in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

60. *Meade v. State*, 390 So. 2d 685, 693 (Ala. Crim. App. 1980).

61. *Id.*; *see, e.g.*, *Boyles v. Dougherty*, 2013 WL 5394326, No. 1120395, at *5 (Ala. Sept. 27, 2013) ("As a general rule, decisions as to a witness's competency to testify as an expert on a particular subject are within the discretion of the trial court."); *Revis v. State*, 101 So. 3d 247, 292 (Ala. Crim. App. 2011) ("[T]he Committee's Notes to this rule affirm that under Rule 702, as under preexisting law, the determination of whether a witness qualifies as an expert and should be allowed to testify as such rests largely within the discretion of the trial court.").

62. Order on Remand at 2, Hinton v. State, Nos. CC-1985-3363.60, -3364.60 (Cir. Ct. Jefferson County Mar. 10, 2009).

treated in the same manner as Mr. Payne. . . . At no time, with no witness[,] did either party specifically offer the witness as an expert, nor did either party specifically object to any of the witness'[s] qualifications as an expert."[63]

Judge Petro also pointed to several pretrial conversations between Perhacs and Judge Garrett, noting, "It seems more than obvious to this Court that these conversations centered on Perhacs'[s] use of Andrew Payne as an expert witness at trial. At no time during these conversations did Judge Garrett ever say anything to discourage Mr. Payne's hiring as a defense expert."[64] In fact, the record suggests that Judge Garrett proposed using Payne as an expert witness, as the prosecutor stated, "I would say that the Court is familiar with Mr. Payne's reputation. Otherwise, I assume that the court would not have recommended that name to Mr. Perhacs."[65]

Hinton never raised the issue of Payne's qualification on direct appeal. In his Rule 32 petition, however, Hinton alleged that his trial counsel had provided ineffective assistance of counsel because Payne was unqualified as an expert witness in firearms and projectiles.[66] Denying the petition, Judge Garrett wrote, "Since this trial, Mr. Payne has been qualified as an expert

---

63. *Id.*
64. *Id.* at 3.
65. *Id.* at 3–4.
66. Pet. App. A at 68 (Cobb, J., dissenting).

witness in firearms and projectiles in several courts across Alabama."[67] He also found that Payne's "expert testimony" was more "compelling of innocence" than the testimony of the three experts Hinton presented at the evidentiary hearing.[68]

The Alabama Court of Criminal Appeals adopted the circuit court's findings.[69] Regarding the issue of ineffective assistance of counsel, the court found Hinton's argument meritless:

> We have reviewed Payne's trial testimony, and we note that he testified in detail about his extensive experience with firearms and toolmarks; the identification of striations and lands and grooves; how rifling is created; how bullets travel when shot; his extensive use of comparison microscopes; various ways toolmarks can be obscured or obliterated, including by corrosive primers; his examination of the bullets and revolver in this case; and his conclusion that the bullets had not been fired from the revolver that was recovered from the appellant's mother. We also note that defense counsel thoroughly and extensively cross-examined the State's firearm and toolmark experts and that Payne apparently prepared him for that cross-examination. We further note that, even though Payne did not test-fire the revolver, he examined the bullets the State's experts test-fired. Therefore, unlike the appellant's Rule 32 experts, Payne examined the same test bullets the State's experts examined. Finally, we note that Payne's testimony was more favorable to the defense than that of the appellant's Rule 32 experts because he testified *unequivocally* that the Davidson, Vason, and Smotherman bullets had not been fired from the revolver that was recovered from the appellant's mother. Thus, even assuming that counsel's apparent ignorance that the cap on expert expenses had been lifted constituted

---

67. *Id.* at 29.
68. *Id.* at 29.
69. *Id.* at 30.

> deficient performance, for the reasons set forth herein, the appellant has not shown that he was prejudiced by that deficient performance.[70]

The Supreme Court of Alabama remanded the matter to allow the circuit court to make specific findings regarding Payne's qualifications as a firearm and toolmark expert.[71] On second remand, Judge Petro listed eleven findings of fact from the record regarding Payne and ruled that he was an expert witness when he testified in Hinton's trial, based on the pre-1996 criteria. Specifically, the order noted the following:

> 1) During his service in the Air Force[,] Mr. Payne was an instructor in the gunnery program and worked on "development research of guns";
> 2) Throughout his 30 year career with the Air Force, Mr. Payne was involved with the design of gun barrels;
> 3) During his Air Force [c]areer[,] Mr. Payne was involved with the testing of firearms and bullets on a daily basis;
> 4) During his Air Force career[,] he examined bullets fired from machine guns and examined bullets fired from handguns on a regular basis;
> 5) During the 1950s[,] he served on the weapons evaluation board of the Air Force and examined fired bullets approximately 6000 times;
> 6) He worked at the Pentagon as the "technical assistant to the deputy chief of staff for research and technology[,]" which include research and design of all weapon, non-nuclear;
> 7) He was a member of the American Academy of Forensic Sciences[,] through which he received all publications of the criminalistics branch[,] which included firearms identification;
> 8) Throughout his career[,] he learned how "barrels and bullets put toolmarks on one another";

---

70. *Id.* at 43 (emphasis in the original).
71. Pet. App. B at 5.

> 9) Prior to his examination of Hinton's gun[,] he had viewed bullets under a comparison microscope "thousands" of times;
> 10) Throughout his career[,] he spent much of his time matching ammunition back to a particular gun barrel. Even more specifically[,] Payne had spent six to nine months of his career involved 100 [percent] of the time "specifically matching a projectile to a barrel";
> 11) Payne had previously been qualified as an expert witness in both civil and criminal courts in Jefferson County[, Alabama].[72]

On second return to remand, the Court of Criminal Appeals found Hinton's arguments "unpersuasive" and stated that Judge Petro's findings were "supported by the record."[73] After revisiting Payne's credentials, the court concluded that Payne "clearly possessed knowledge of gun barrels, rifling characteristics, and toolmarks beyond that of an average layperson" and that the circuit court did not abuse its discretion in finding him qualified as an expert.[74] On third remand, the Court of Criminal Appeals reviewed Payne's qualifications de novo and again affirmed the judgment of the circuit court.[75]

---

72. Order on Remand at 2, Hinton v. State, Nos. CC-1985-3363.60, -3364.60 (Cir. Ct. Jefferson County Sept. 1, 2010).
73. Pet. App. C at 7.
74. *Id.* at 8–9. The amici's position that the Court of Criminal Appeals violated *Strickland* in finding that Hinton's counsel was not deficient for presenting the testimony of a qualified firearms expert is unfounded. *See* Br. Constitution Project at 19–20. Furthermore, the court noted that in *Wilson v. Greene*, 155 F.3d 396, 401 (4th Cir. 1998), the Fourth Circuit Court of Appeals wrote, "The Constitution does not entitle a criminal defendant to the effective assistance of an expert witness." The Court of Criminal Appeals explained that although *Wilson* pertained to the mental health experts, the Alabama Supreme Court had, "at least implicitly, extended the *Wilson* rationale to other experts" by its 2008 opinion in *Ex parte Hinton* (Pet. App. B). Pet. App C at 10–11 n.7.
75. Pet. App. E at 2.

Following this decision, the Supreme Court of Alabama denied Hinton's petition for writ of certiorari.[76]

Thus, the trial judge, a circuit judge, and the Alabama Court of Criminal Appeals all found Payne to be a qualified expert witness in the field of firearm and toolmark identification. Although Payne may not have been a perfect expert witness for the defense, he was far from the incompetent buffoon Hinton incorrectly makes him out to be.[77]

B. Trial counsel was not deficient for hiring a qualified expert witness.

Sheldon Perhacs, Hinton's trial counsel, did not render ineffective assistance by hiring Payne as an expert witness. Regardless of Perhacs's reasons for hiring Payne, the fact remains that every court to consider the

---

76. Pet. App. F.

77. The amici also offer unwarrantedly harsh criticism of Payne's performance. For example, the amici reference Payne's difficulty in using the comparison microscope provided by DFS as proof of his incompetence. *See* Br. Constitution Project at 14. Payne testified that he had used comparison microscopes "thousands" of times, however. *See* Order on Remand at 2. The fact that Payne did not instantly know how to use a particular brand of microscope has no bearing on his qualification. As one of the State's experts later testified, "[U]nless you were familiar with that model [of microscope], you would need someone familiar with it to show you." *See* Pet. App. C at 9.

The amici further count against Payne the fact that he was "partially blind." Br. Constitution Project at 8. It is undisputed that Payne had only one eye, but binocular vision is not necessary to examine projectiles under a comparison microscope, which produces a flattened image.

issue has deemed Payne qualified. Perhacs cannot be ineffective simply because the jury believed the State's experts.

Hinton is trying to use this Court to do what Judge Garrett and the Alabama Court of Criminal Appeals feared: present "better" experts to an appellate court to work around the jury's decisions. As the Court of Criminal Appeals explained, quoting Judge Garrett's order denying the petition:

> "What if we come up with some different experts later on that are even more recognized as the ultimate experts? That's what we're getting into is a swearing contest between experts. . . . It concerns me that we're going to get into a situation where somebody—one party feels that they have a better expert than was presented the last time, therefore the evidence is more believable. And that issue has already been addressed by a jury. This is a question of fact, not a question of law, and the question of facts are decided by the jury. I would be in essence second-guessing the jury and [its] determination based on the evidence that was presented to [it] on the same issues."

> We share the circuit court's concerns, and we note that a party cannot go back after the trial to secure what he considers to be a more qualified expert. Allowing a party to do so would be contrary to the requirement of Rule 32.1(e)(2), Ala. R. Crim. P., that evidence not be merely cumulative to other facts that were known. Also, in such circumstances, proceedings might never end because, theoretically, better experts might always be found. The appellant had a chance to present expert testimony to the jury, and he did so. In fact, as we explain throughout this opinion, Payne's testimony was much more favorable than that of the Rule 32 experts.[78]

---

78. Pet. App. A at 31 (internal citation omitted).

Payne met the criteria for an expert witness in Alabama at the time of Hinton's trial: "by study, practice, experience or observation as to the particular subject, [he had] acquired a knowledge beyond that of an ordinary witness."[79] Perhacs was not ineffective for hiring him.

C. The Alabama Court of Criminal Appeals properly applied *Strickland* when it found that Hinton's claim of ineffective assistance of counsel was meritless.

Hinton concludes his petition by alleging that the Alabama Court of Criminal Appeals' analysis regarding his ineffective assistance claim conflicts with the Sixth Amendment and *Strickland v. Washington*.[80] Specifically, Hinton alleges that the court erred in finding that because Payne was a qualified expert witness, Perhacs was not ineffective for relying on him.[81] This claim is meritless.

In a single paragraph of claim I.B.2 of the third amended Rule 32 petition, Hinton posited that he was denied effective assistance of trial counsel because Perhacs failed to "obtain and present qualified ballistics experts."[82] Judge Garrett determined that Hinton had failed to meet either

---

79. *Meade v. State*, 390 So. 2d 685, 693 (Ala. Crim. App. 1980).
80. 466 U.S. 668 (1984).
81. Pet. at 29.
82. R32. 418–19. Paragraph 44 cross-references claims I.G and I.K of the petition, which, respectively, state that Hinton's right to present a defense was unconstitutionally restricted by the court's failure to grant Perhacs's request for additional funds to hire an expert, and that prosecutorial misconduct

the high *Strickland* standard or the requirements of Alabama Rule of Criminal Procedure 32, and he deemed the ineffective assistance claim deficient for two reasons.[83] First, the claim was initially raised in Hinton's 1998 amended petition, and therefore fell afoul of the two-year statute of limitations required by Rule 32.2(c). As the claim was new and did not relate back to Hinton's original petition, it was dismissed as untimely.[84] Secondly, as Payne was a qualified expert witness, Hinton had failed to state a claim upon which relief might be granted, and the claim was therefore dismissed pursuant to Rule 32.7(d).[85]

On appeal, Hinton raised his ineffective assistance claim again as claim III.B.[86] The Alabama Court of Criminal Appeals, writing in 2006, laid out the requirements of *Strickland*—deficient performance and resultant prejudice—then quoted *Strickland*'s direction that "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct."[87] Turning to the claim at issue, the court first found that it was not

---

(assumedly, the prosecutor's comments about Payne) violated Hinton's constitutional rights.

83. R32. 1538–39, 1545–48.
84. R32. 1545–46.
85. R32. 1547–48.
86. Br. Appellant at 66–77, Hinton v. State, No. CR-04-0940, 2006 WL 1125605 (Ala. Crim. App. Apr. 28, 2006).
87. Pet. App. A at 16 (quoting *Strickland v. Washington*, 466 U.S. 668, 690 (1984)).

properly before them because, as the circuit court noted, Hinton did not first present it to the circuit court. The Court of Criminal Appeals then stated that even if the argument had been properly presented, it was meritless.[88] The court found that Payne was a qualified expert, that Perhacs "thoroughly and extensively cross-examined the State's firearm and toolmark experts," and that Payne, the expert Hinton now maligns, "apparently prepared [Perhacs] for that cross-examination."[89] The court also noted that Payne's testimony was more favorable to the defense than Hinton's "better" experts' testimony had been, and that Payne, unlike the later experts, actually examined the State's experts' test bullets. In conclusion, the court wrote, "Thus, even assuming that counsel's apparent ignorance that the cap on expert expenses had been lifted constituted deficient performance, for the reasons set forth herein, the appellant has not shown that he was prejudiced by that deficient performance. *See Strickland, supra.*"[90]

Clearly, the Court of Criminal Appeals conducted a *Strickland* analysis of Hinton's ineffective assistance claim in 2006 and determined that the claim was meritless. Hinton now makes much of the Court of Criminal Appeals' 2011 opinion, arguing that the court did not conduct a *Strickland*

---

88. *Id.* at 43
89. *Id.*
90. *Id.*

analysis at that time. But the only issue on which Hinton's case was remanded after 2008 was whether Payne was qualified to testify as a firearm and toolmark expert.[91] Judge Petro and the Alabama Court of Criminal Appeals agreed that he was,[92] and the Supreme Court of Alabama implicitly found that Hinton's ineffective assistance of counsel claim lacked sufficient merit to warrant further review when it denied certiorari.[93]

Hinton's claim of ineffective assistance of counsel in regards to the hiring of Payne is meritless. It raises no constitutional concerns and no cause to disturb the judgment rendered below.

II. There is no need for error correction because Hinton can raise his ineffective assistance claim in federal habeas proceedings.

Even if the Alabama courts were mistaken about Hinton's ineffective assistance claim — and they were not, as explained above — this Court should not review the state courts' judgment here because the federal habeas court can resolve these issues.[94] Given the availability of federal habeas relief, there is no compelling reason for this Court to expend its limited resources on the case-specific question at issue here.

---

91. Pet. App. B at 5.
92. Pet. App. E at 2.
93. *See* Pet. App. F.
94. *See, e.g.*, *Hopkinson v. Shillinger*, 866 F.2d 1185, 1219–20 (10th Cir. 1989) ("Even if the state postconviction petition was dismissed arbitrarily, the petitioner can present anew to the federal courts any claim of violation of his federal constitutional rights.").

On federal habeas, Hinton will be able to present his arguments about the Alabama courts' decisions. If Hinton is right when he argues that the Alabama Court of Criminal Appeals substantively misapplied this Court's Sixth Amendment precedents to his ineffective-assistance claim, then the federal habeas court could find the Alabama court's decision to be "contrary to, or . . . an unreasonable application of, clearly established Federal law" and grant him relief.[95] There is no need for this Court to grant certiorari.

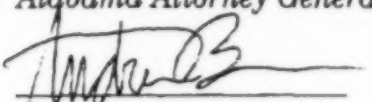
95. 28 U.S.C. § 2254(d). Although the amici correctly note that AEDPA applies on federal habeas review, *see* Br. Constitution Project at 20–21, AEDPA does not foreclose federal relief on state-court *Strickland* determinations.

CONCLUSION

This Court should deny certiorari.

Respectfully submitted,

LUTHER STRANGE
Alabama Attorney General



Andrew Brasher
Deputy Solicitor General
*Counsel of Record

Lauren A. Simpson
Assistant Attorney General

OFFICE OF ALA. ATT'Y GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 353-2609
abrasher@ago.state.al.us

STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

LUTHER STRANGE
ATTORNEY GENERAL

501 WASHINGTON AVENUE
P.O. BOX 300152
MONTGOMERY, AL 36130-0152
(334) 242-7300
WWW.AGO.ALABAMA.GOV

November 13, 2013

Via Federal Express
Scott Harris, Clerk of the Court
Supreme Court of the United States
1 First Street, NE
Washington, DC 20543

RE: **No. 13-6440**
Anthony Ray Hinton v. State of Alabama

Dear Mr. Harris:

Enclosed please find the following:

- Original and 10 copies of the Brief in Opposition to Petition for Writ of Certiorari.
- Original and one copy of the Certificate of Service.
- Copy of brief cover page

Please return the file-marked copies in the enclosed self-addressed stamped envelope.

Sincerely,

Lindsey C. Killough

Lindsey C. Killough, ACP
Paralegal
(334) 353-1472
lkillough@ago.state.al.us

Encl.
cc. Bryan A. Stevenson

RECEIVED
NOV 15 2013
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 13-6440
CAPITAL CASE

In the
Supreme Court of the United States

ANTHONY RAY HINTON,
Petitioner,
v.
STATE OF ALABAMA,
Respondent.

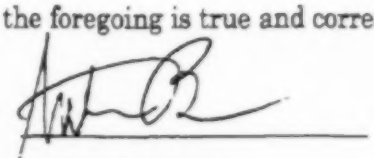
RECEIVED
NOV 15 2013
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CERTIFICATE OF SERVICE

I, Andrew Brasher, do hereby declare that on this date, November 13, 2013, as required by Supreme Court Rule 29, I have served the enclosed BRIEF IN OPPOSITION on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of the following and with first class postage prepaid, or by delivery to a third party commercial carrier for delivery within 3 calendar days:

Bryan A. Stevenson
122 Commerce Street
Montgomery, AL 36104

I declare under penalty of perjury that the foregoing is true and correct.



Andrew Brasher
Deputy Solicitor General

Office of the Attorney General
501 Washington Avenue
Montgomery, Alabama 36104
Tel: (334) 353-2187
Fax: (334) 242-4891
abrasher@ago.state.al.us

November 13, 2013

REPLY BRIEF

Supreme Court, U.S.
FILED
NOV 22 2013
OFFICE OF THE CLERK

ORIGINAL

No. 13-6440

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY RAY HINTON, Petitioner,

v.

STATE OF ALABAMA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE ALABAMA COURT OF CRIMINAL APPEALS

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

RECEIVED
NOV 26 2013
OFFICE OF THE CLERK
SUPREME COURT, U.S.

BRYAN A. STEVENSON
Counsel of Record
CHARLOTTE R. MORRISON
AARYN M. URELL
Equal Justice Initiative
122 Commerce Street
Montgomery, AL 36104
bstevenson@eji.org
(334) 269-1803

Counsel for Petitioner

November 22, 2013

No. 13-6440

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY RAY HINTON, Petitioner,

v.

STATE OF ALABAMA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE ALABAMA COURT OF CRIMINAL APPEALS

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

BRYAN A. STEVENSON
Counsel of Record
CHARLOTTE R. MORRISON
AARYN M. URELL
Equal Justice Initiative
122 Commerce Street
Montgomery, AL 36104
bstevenson@eji.org
(334) 269-1803

Counsel for Petitioner

November 22, 2013

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES ii

ARGUMENT 1

I. The Constitutional Duty of a Criminal Defense Attorney to Engage Credible and Effective Expert Assistance When a Conviction Turns on Forensic Evidence Is a Critically Important Issue This Court Should Address. 1

II. The State Mischaracterizes the Record to Understate the Importance of the Issue in this Case. 9

III. This Petition for Certiorari Presents a Superior Vehicle for this Court to Address the Critical Sixth Amendment Issues Presented Here. 13

CONCLUSION 15

TABLE OF CITED AUTHORITIES

CASES

Alabama Power Co. v. Robinson, 447 So. 2d 148 (Ala. 1983) 4

Anderson v. Bessemer City, 470 U.S. 564 (1985) 12

Burt v. Titlow, No. 12-414, 2013 WL 5904117 (U.S. Nov. 5, 2013) 14

Charest v. State, 854 So. 2d 1102 (Ala. Crim. App. 2002) 15

Cullen v. Pinholster, 131 S. Ct. 1388 (2011) 14

Erwin v. Sanders, 320 So. 2d 662 (Ala. 1975) 4

Harrington v. Richter, 131 S. Ct. 770 (2011) 14

Ex parte Hinton, No. 1110129 (Ala. Apr. 19, 2013) 3

Hinton v. State, 548 So. 2d 547 (Ala. Crim. App. 1988) 3, 9

Hinton v. State, No. CR-04-0940, 2006 WL 1125605
(Ala. Crim. App. Apr. 28, 2006) 1, 2, 3, 10

Hinton v. State, No. CR-04-0940, 2011 WL 3780644
(Ala. Crim. App. Aug. 26, 2011) 1

Ex parte Jenkins, 972 So. 2d 159 (Ala. 2005) 15

Lawrence v. Florida, 549 U.S. 327 (2007) 14

Rye v. Black & Decker Mfg. Co., 889 F.2d 100 (6th Cir. 1989) 4

Strickland v. Washington, 466 U.S. 668 (1984) 1, 2, 14

Thomas v. Black & Decker, Inc., 502 So. 2d 157 (La. Ct. App. 1987) 4

STATUTES

28 U.S.C. § 2244(d) 14

28 U.S.C. § 2254(d)(1) 14

ARGUMENT

I. The Constitutional Duty of a Criminal Defense Attorney to Engage Credible and Effective Expert Assistance When a Conviction Turns on Forensic Evidence Is a Critically Important Issue This Court Should Address.

The Sixth Amendment analysis enunciated by this Court in Strickland v. Washington, 466 U.S. 668 (1984), requires reviewing courts to evaluate the reasonableness of counsel's performance in light of prevailing professional standards and the totality of the evidence adduced at trial and in postconviction proceedings. The Alabama Court of Criminal Appeals did not apply this standard. Instead, it concluded that because Andrew Payne's testimony met the bare standards of evidentiary admissibility, counsel's reliance on Payne was per se reasonable. Hinton v. State, No. CR-04-0940, 2006 WL 1125605, at *31 n.12 (Ala. Crim. App. Apr. 28, 2006) (finding evidence relating to Payne's competence irrelevant because circuit court admitted Payne's testimony as an expert); Hinton v. State, No. CR-04-0940, 2011 WL 3780644, at *8 (Ala. Crim. App. Aug. 26, 2011) ("Because Payne was a qualified expert in firearms identification . . . , Hinton's claim that his trial counsel was ineffective for not procuring a qualified firearms-identification expert is meritless."). Accordingly, review by this Court is fully justified. Nothing in the State's Brief in Opposition undermines this conclusion.

Notably, the State does not argue that counsel's decision to hire Payne was reasonable in light of prevailing professional standards in a death penalty case or in light of the totality of the evidence adduced at trial and in postconviction proceedings,

as required by Strickland. Instead, the State argues that the lower court properly reduced the Sixth Amendment question to one that looks exclusively to minimum standards of evidentiary admissibility, and that the court properly found that because Payne's testimony was admissible, counsel's reliance on Payne was per se reasonable under Strickland:

> Payne met the criteria for an expert witness in Alabama at the time of Hinton's trial: "by study, practice, experience or observation as to the particular subject, [he had] acquired a knowledge beyond that of an ordinary witness."

State's Br. in Opp'n 22. The State's argument supports the need for the Court to grant certiorari review. This argument begs the question of whether the admissibility of a witness's testimony under state evidentiary rules is dispositive when assessing whether counsel's failure to obtain a credible and effective expert on the single most important issue in a death-penalty trial is deficient and prejudicial.

The State's argument that the Sixth Amendment question presented in this case is "meritless" because "[e]very court to consider his claim has found that Payne was a qualified expert witness," State's Br. in Opp'n 1, is not persuasive. First, far from patently meritless, this is a question that has divided every appellate court to consider it. A three-member majority of the Court of Criminal Appeals affirmed his conviction over strong dissents criticizing the majority for failing to respond to the vast evidence that a miscarriage of justice has occurred;[1] and certiorari review was denied in a

---

[1]Hinton, 2006 WL 1125605, at *66 (Cobb, J., dissenting) ("There exists ample evidence that the adversarial system suffered a severe breakdown here because of trial counsel's ignorance of the law and his resulting decision to retain an unqualified witness. As a result, the confidence in the outcome of Hinton's trial has been seriously undermined."); id. at *70 (Shaw, J., dissenting) ("I am concerned that

narrowly divided 4-3 order, Ex parte Hinton, No. 1110129 (Ala. Apr. 19, 2013).

The State's argument that Payne met the minimum standards of evidentiary admissibility rests entirely on the State's characterization of Payne's own testimony at trial. According to Payne's testimony, he underwent no training in firearms identification or toolmark examination; took no courses on the subject; and did not belong to or participate in the trainings offered by the gatekeeper professional organization for firearms and toolmark examiners, the Association of Firearms and Toolmark Examiners. (R. 1572-77, 1642-43.)[2] Payne acknowledged that his only experience matching bullets to a barrel was during an eight- or nine-month period when he compared pieces of heavy ordnance fired from known .50-caliber artillery guns. (R. 1641-42.)[3] He had no experience comparing a bullet of unknown origin to a weapon for firearms identification purposes.[4] The State argues, first and foremost, that Payne was competent because he had a military career, State's Br. in Opp'n 5, but identifies no relevant experience in firearms identification during his military experience. Indeed, Payne testified that he spent his time in the military researching

---

confidence in the outcome of Hinton's trial was seriously compromised by the failure of trial counsel to seek the additional funding to which he was entitled.").

[2]References are to the appellate record below in this case. "R." refers to the trial transcript. "PC." refers to the clerk's record in the state postconviction proceedings. "PR." refers to the transcript of the postconviction hearing.

[3]The weapon the State contended was used to commit the Vason and Davidson offenses was a .38-caliber Smith & Wesson revolver. Hinton v. State, 548 So. 2d 547, 553 (Ala. Crim. App. 1988).

[4]As then-Judge Cobb recognized, Payne's time in the military was spent "working on various bombs and fuses and then designing delivery schemes with bombs for certain specialized targets" and being the "project officer for the .60 caliber machine gun." Hinton, 2006 WL 1125605, at *62 (Cobb, J., dissenting) (internal quotation marks omitted); see also id. at *70 (Shaw, J., dissenting) (Payne "was a civil engineer with a military background primarily in heavy weapons and ordnance").

heavy ordnance and, in the vast majority of cases he was not required to compare a spent projectile to test projectiles in order to identify which specific weapon fired the spent projectile; rather, he looked at fired artillery shells to "see the effect of the impact with the target." (R. 1640; see also R. 1601 ["[W]e had to examine the bullets to see whether or not the bullets were performing the tasks which we wanted them to perform and if not what we had to do to correct the problem."].)

The State's reliance on Payne's experience testifying as an expert witness also is misplaced. At Mr. Hinton's trial, Payne admitted on cross-examination that he had testified in court as a consulting engineer more than a thousand times but only twice in a case involving firearm and tool marks identification, and one of those was a civil case. (R. 1654-56.) Payne typically provided courtroom testimony in civil cases about questions involving radio antennae, electrical lines, Black & Decker power tools, and car accidents. See, e.g., Rye v. Black & Decker Mfg. Co., 889 F.2d 100 (6th Cir. 1989) (negligence case involving Black & Decker saws); Thomas v. Black & Decker, Inc., 502 So. 2d 157 (La. Ct. App. 1987) (failure analysis involving power tools); Alabama Power Co. v. Robinson, 447 So. 2d 148 (Ala. 1983) (radio antenna and overhead power lines); Erwin v. Sanders, 320 So. 2d 662 (Ala. 1975) (car accident). In at least one other Alabama case, Payne demonstrated his willingness to offer expert opinion testimony when he was not in a position to do so credibly.[5]

---

[5]The Alabama Supreme Court found in Alabama Power Co. v. Robinson, 447 So. 2d 148 (Ala. 1983), that the trial court erred in allowing Payne to testify that a radio antenna "apparently" struck power service lines because his testimony was "not a reasonable inference deduced from a premise of fact; rather it was a conclusion based on speculation and conjecture." Id. at 150, 153. The court further found that Mr. Payne "incorrectly recalled" the facts he asserted in support of his opinion testimony. Id.

The State complains that Mr. Hinton and amici offer "unwarrantedly harsh" criticism of Payne and "incorrectly make[] him out to be" "an incompetent buffoon." State's Br. in Opp'n 20. The difficulty for Respondent is that it was the State's own lawyers who characterized Mr. Payne as a charlatan and convinced the jury that Payne was "no expert at all" to obtain a conviction in this case. (R. 1727.) On cross-examination and armed with knowledge from his own expert who was present when Payne examined the evidence, the prosecutor at trial elicited Payne's many difficulties in executing even the most basic functions with the comparison microscope necessary to examine the bullets in question. Payne admitted that he had to ask the State's expert for help turning on the light source for the comparison microscope even though it was equipped with the same kind of switch commonly used on microscopes; that he had mistakenly turned on an electric inscribing tool when trying to turn on this light source; and that he did not know how to manipulate the dual stages of the comparison microscope, operate the slow motion controls to raise and lower these stages, or even operate the turret lenses of the microscope. (R. 1650-53.) Payne also admitted that he struggled for over ten minutes to locate a bullet under the microscope before proclaiming, "Hell, I can't even find it . . . I don't know how to operate the machine . . . , will someone please help me?" (R. 1653.) Payne also admitted that he finally located the bullets under the microscope after twenty minutes of looking and only with assistance from the State's expert. (R. 1653-54.) The prosecutor had Payne show his tools to the jury, then pointed out to the jury that Mr. Payne's tools – the calipers, an ordinary hand magnifying glass, and a steel gauge – were described on page six of an

authoritative text on firearms investigation as the tools of "charlatans." (R. 1648, 1666-67.) The cross-examination ended with the State exposing that Payne had only one eye. (R. 1667.)

The State extensively relied on this exposure of Payne in closing arguments. See Pet. Cert. at 13 (citing to State's closing argument, R. 1727-33). The prosecutor unfavorably compared Payne's credentials to the credentials of the State's expert, and argued that "Mr. Payne says he has testified at least a thousand times as an expert witness, as a consulting engineer. Well, a consulting engineer, ladies and gentlemen, is not a firearms and tool marks experts, and he's no expert. No expert at all." (R. 1727.) The prosecutor noted that "Andrew Payne, Jr. did not know what in the world he was doing, but he is ready to come down here and tell you I'm an expert, I've got all this experience, . . . I'll give you my opinion." (R. 1730.) After arguing at length that Payne was a "civil engineer" with no qualifications in firearms identification, the prosecutor closed by saying:

> My Lord in heaven, the height of irresponsibility for somebody to come in here and do something like that. That is incredible. It's irresponsible and I ask you to reject his testimony and you have that option because you are the judges of the facts and whose testimony, Mr. Yates' or Mr Payne's you will give credence to, and I submit to you that as between these two men there is no match between them. There is no comparison. One man just doesn't have it and the other does it day in and day out, month in and month out, year in and year out and is recognized across this state as an expert.

(R. 1733-34.)

The State now contends that "[t]he fact that Payne did not instantly know how

to use a particular brand of microscope has no bearing on his qualification" and that Payne was missing one eye is unimportant because "binocular vision is not necessary to examine projectiles under a comparison microscope, which produces a flattened image." State's Br. in Opp'n 20. But the State relied at length on these factors at trial to discredit Payne. In closing arguments at trial, the State argued that:

> This is a one-eyed man, what kind of depth perception does a one-eyed man have? What kind of superior scopic vision to have to be able to even make any judgment about [tool marks]. You're educated people. I submit to you he doesn't even have depth perception and yet he's looking at a surface, not a flat object but a round object which requires depth perception.

(R. 1731.) In finding Payne's willingness to testify "startling and disturbing," the prosecutor further noted, "I said [to Payne on cross-examination] are you familiar with comparison microscope. Of course, I've used it at least a thousand times and yet when he goes to a lab to use a comparison microscope . . . [t]his man has no idea, he didn't have a clue about what he was doing." (R. 1728.)

The State first characterized Payne as an unqualified charlatan and demonstrated why his unfamiliarity with the equipment and visual impairment matters. While the State made a strong case for Payne's incompetence at trial, most critically, when Mr. Hinton claimed during postconviction that his attorney was ineffective for going to trial with an incompetent expert, the State presented no evidence to refute Payne's incompetence. Instead, the State's own experts provided further testimony condemning Payne. Both of the State's DFS examiners, David Higgins and Lawden Yates, testified during Rule 32 proceedings that Andrew Payne

lacked experience and qualifications in forensic firearms identification. (PC. 2208-09, 2220, 2304-08.) Higgins stated "I don't believe that [Payne] had had [firearm and toolmark identification] experience inasmuch as that we had to assist him in simple tasks like turning on the microscope." (PC. 2208-09.) Higgins testified that, based on his observations of Payne's conduct in the lab, Payne "didn't have the basic knowledge of the microscope." (PC. 2220.) Yates likewise testified that "[Payne] was unfamiliar with the use of the microscope . . . . I specifically recall him asking questions which I thought were inappropriate such as how do you turn the lights on on this machine, and where is the slow motion button." (PC. 2305-06.) Yates testified that Payne "demonstrated an obvious limited ability to do the kind of work that we were conducting at that time" (PC. 2304-05) and "the fact that he showed up employing the use of a magnifying glass, a pair of outside calipers and a steel ruler indicated to me that he probably had limited knowledge of firearms identification" (PC. 2306). Yates observed that these tools "would have limited value in firearms identification" and "have been mentioned in a textbook which describes the appearance of charlatans as employing those tools." (PC. 2307.) Yates testified that Payne's failure to independently test-fire the Hinton firearm was not what he would expect from an independent examiner. (PC. 2308 ["[I] would expect an independent examiner to request his own test bullets."].)[6]

---

[6]Higgins said post-trial that the inability to turn on the microscope "could happen to anyone" but made clear that his observations of Payne's examination led him to believe that Payne lacked the qualifications and experience necessary to conduct the toolmark examination, that Payne's examination was defective, and that Payne did not have basic knowledge of the comparison microscope. (PC. 2208-09, 2220.)

II. The State Mischaracterizes the Record to Understate the Importance of the Issue in this Case.

The State makes several key mischaracterizations of the trial record which require a response. First, the State's assertion that Smotherman "quickly picked Hinton out of a photographic array," State's Br. in Opp'n 4, is misleading[7] at best because it omits that Smotherman picked out Mr. Anthony Hinton's photo – with "AH" printed on it – immediately after he was told the suspect's name was Anthony Hinton. (R. 804, 807-08.) The detective who conducted the photo array acknowledged that Smotherman may have known that someone named Anthony Ray Hinton was a suspect. (R. 804.) He also testified that the photo Smotherman chose contained the initials "A.H." for Anthony Hinton. (R. 804.)[8] Moreover, while the State asserts that Mr. Smotherman "gave a detailed description of the robber," the record shows that Mr. Smotherman's description of a 5'11", 190-pound assailant did not even come close to Mr. Hinton, who is 6'2" and over 230 pounds. (R. 910, 2149.)[9]

---

[7]The other evidence the State asserts to link Mr. Hinton to the Smotherman crime is meaningless to the capital murder convictions if there is no gun match. If the Smotherman bullets were not fired from the same gun that fired the Vason and Davidson bullets, it does not matter who committed the Smotherman offense because the gun match was the only basis for admitting any evidence about the Smotherman offense at this trial. The Smotherman incident was not charged in the indictment, Hinton v. State, 548 So. 2d 547, 556 (Ala. Crim. App. 1988), and Mr. Hinton was never tried or convicted for the Smotherman offense.

[8]Law enforcement also talked to one of Mr. Smotherman's co-workers, Robert Stephenson, who testified at Mr. Hinton's post-conviction hearing in June 2002 that the police pressured him to identify Mr. Hinton as the perpetrator, but he did not do so. (PR. 153.) Mr. Stephenson testified that a detective visited his home, showed him three pictures and asked him to pick out one. When Mr. Stephenson told the detective he had never seen any of the people in the photos, the detective specifically directed him to a photo of Mr. Hinton, but Mr. Stephenson still could not identify him. (PR. 153-55.) The State never called Mr. Stephenson as a witness. (PR. 156.)

[9]Evidence presented during the post-conviction hearing further showed that Smotherman confused his assailant with a professional football player who stopped to assist him (PR. 160-61); that Mr. Hinton did

Second, the State incorrectly argues that the state court properly found that trial counsel's reliance on Payne was reasonable because "Payne's testimony was more favorable to the defense than Hinton's 'better' experts' testimony had been, and that Payne, unlike the later experts, actually examined the State's experts' test bullets." State's Br. in Opp'n 24 (quoting Hinton v. State, No. CR-04-0940, 2006 WL 1125605, at *43 (Ala. Crim. App. Apr. 28, 2006)); see also State's Br. in Opp'n 17 (quoting Hinton, 2006 WL 1125605, at *29)). This assertion is false. All three Rule 32 experts compared the evidence bullets to the pre-cleaning test bullets fired and examined by the State's experts. (PR. 77, 78, 109.) Based on their examination of the State's test bullets as well as their own, Emanuel and Cooper determined that the six bullets could not all be linked to a single weapon and none of the six bullets can be matched to the Hinton revolver. (PR. 105-06, 73-74, 116-17.) Emanuel, Cooper, and Dillon each testified that independent microscopic examinations of the six recovered bullets established that the bullets could not be linked to a single weapon. (PR. 73-74, 116-17, 141-43.) They also concluded that the revolver cannot be matched with the recovered bullets. (PR. 73-74, 116-17, 141-43.)

The State's suggestion that Payne's use of the State's test bullets, rather than his own test bullets, made him a "better" expert is factually incorrect in a second way. It was the testimony of every firearms examiner in this case, including the State's own examiners, that Payne's failure to obtain his own test bullets was a significant

---

not own a car that fit any of Smotherman's descriptions and that Smotherman gave varying descriptions of the assailant's car (PH. 139-40; R. 904-05); and Smotherman could not tell the difference between a boxy Mercedes sedan and a sporty Porsche (PC. 2493; PR. 164, 198).

departure from standard procedure; no qualified toolmark examiner would proceed the way Andrew Payne did in this case. (PC. 2220, 2308.)[10]

Similarly, the State's assertion that Payne's testimony was more compelling is not persuasive. Payne did not aid Mr. Hinton's defense by giving a "favorable" opinion to the jury. None of Payne's testimony was favorable because it was not believable. By suggesting it mattered not whether Payne was qualified or credible, but only that he uttered a favorable opinion in court, the State asks this Court to find that trial counsel acts reasonably if he presumes jurors will leave their common sense at the courthouse door and credit testimony without noticing anything about the witness's lack of expertise or his inability to perform the requisite examination.[11] Under the State's analysis, defense counsel would not be ineffective if he had picked a person at random and put her on the stand to say that, contrary to the opinions of the State's career toolmark examiners, the bullets in this case do not match.

Third, the State's characterization of the expert testimony during postconviction proceedings is misleading. The State, *citing the findings it authored*, asserts that Mr. Hinton's experts at the post-conviction hearing were "vague" and "inconclusive" because they were unable to determine whether any of the bullets were fired by the

---

[10]David Higgins testified that Payne's failure to obtain his own independent test bullets was "a defect in his examination." (PC. 2220.) Lawden Yates testified that he "would expect an independent examiner to request his own test bullets." (PC. 2308.) No qualified examiner would rely on bullets he has not fired or seen fired from the evidence weapon because a proper scientific method is premised on the examination of materials that are valid and reliable. (RTR2 C. 58.)

[11]To the contrary, Mr. Hinton's jury was charged that it should rely on its common sense in finding facts at trial (R. 1829) and that it must consider all the evidence, including a witness's appearance and demeanor, before determining whether to believe expert testimony. (R. 1830-31.)

Hinton weapon. State's Br. in Opp'n 8-10.[12] In fact, there is nothing inconclusive about the experts' findings. Cooper's testimony that none of the bullets, except of the two bullets recovered from the Davidson offense, could be linked to any single weapon, which completely undermines the State's consolidated crimes theory of guilt. There was no evidence connecting Mr. Hinton to the capital murders of Mr. Davidson and Mr. Vason. The State insisted a single weapon fired all of the bullets, which was repudiated during the Rule 32 hearing. (PR. 117 ["Q. Did you conclude that they could not be fired from a single weapon as well? A. Yes."].) Dillon and Emanuel reached the same conclusion. (PR. 73-74, 141-43.)

Additionally, the Rule 32 experts excluded the Hinton weapon as mechanically incapable of firing the Smotherman bullets. Cooper concluded that the Smotherman bullets could not have been fired from the Hinton weapon. (PR. 123.) His testimony was anything but vague:

> [T]he question was[,] was it my opinion that State's Exhibit 54 and 55 could have been fired from State's Exhibit 79. And it's my opinion it could not have been because the mechanical ability of this weapon to produce a bullet of that nature.

(PR. 123.)

The State's argument that the experts' testimony is "inconclusive" is an about-

---

[12]The State's reliance on the "findings" contained in Judge Garrett's order denying postconviction relief and the Court of Criminal Appeals's adoption of those factual findings is problematic. Judge Garrett did not author these findings. Instead, the circuit judge adopted verbatim the 144-page order written by the State's lawyers, and the Court of Criminal Appeals in turn relied on and quoted extensively from that order without conducting an independent review or identifying any convincing evidence that the findings and conclusions are those of the trial court. See Anderson v. Bessemer City, 470 U.S. 564, 572 (1985) (criticizing "courts for their verbatim adoption of findings of fact prepared by prevailing parties").

face from its position in the lower court. The State acknowledged that the experts' testing excluded the Hinton weapon as the murder weapon. In its proposed order, which the trial court signed, the State admitted that the expert testimony conclusively excluded the possibility that the Hinton weapon fired the Smotherman bullets. (PC. 1065 ["Raymond Cooper testified that he was able to exclude the bullet in Exhibit #54 as having been fired from the gun recovered at Hinton's mother's house because he could not get the gun to fire a bullet with as much skidding as there was on #54."].)

Moreover, the State's characterization of this evidence suggests that Mr. Hinton is not entitled to relief unless he presents evidence that excludes the Hinton weapon. State's Br. in Opp'n 10. An exclusion, however, is not required to demonstrate prejudice. This is a case where an unmistakable match between recovered bullets and the Hinton weapon was necessary to accuse Mr. Hinton of these crimes. Rule 32 experts testified unequivocally that no such match exists. The absence of a definitive match is powerful exculpatory evidence that strongly supports Mr. Hinton's claim of ineffectiveness. This is a case, where as the State conceded at trial, without a dispositive match between bullets and weapon there was no basis for prosecution.

III. This Petition for Certiorari Presents a Superior Vehicle for this Court to Address the Critical Sixth Amendment Issues Presented Here.

The State's final argument is that there is no need for certiorari review because if Mr. Hinton's claim of ineffective assistance of counsel is meritorious he will get relief on federal habeas corpus review. State's Br. in Opp'n 25-26. In fact, if denied review by this Court, any further federal review will be constrained by the "doubly deferential"

standard of review under Section 2254(d)(1) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). See Cullen v. Pinholster, 131 S.Ct. 1388, 1403 (2011). As this Court recently reiterated in Burt v. Titlow, the question presented to a federal court on habeas corpus review is entirely different from the question presented to this Court on direct review. No. 12-414, 2013 WL 5904117, at *1 (U.S. Nov. 5, 2013); see also Harrington v. Richter, 131 S. Ct. 770, 785 (2011) ("The pivotal question is whether the state court's application of the Strickland standard was unreasonable. This is different from asking whether defense counsel's performance fell below Strickland's standard.").

As amici urge, criminal trials are increasingly won or lost based on expert forensic testimony, making this an important issue for the Court and the unique posture of this case makes it a superior vehicle for addressing this issue. Br. of The Constitution Project et al. as *Amici Curiae* 20-21. Most claims of ineffective assistance of counsel are not raised until state postconviction and a petition for certiorari does not toll the filing deadline under the AEDPA,[13] so most petitioners are unable to seek certiorari review in this Court following state court litigation. Because AEDPA does not apply in the current posture of this case, this petition for certiorari presents an uncommon opportunity and superior vehicle for this Court to address the critical Sixth

---

[13] Lawrence v. Florida, 549 U.S. 327, 331 (2007) (filing petition for certiorari in United States Supreme Court after state court enters final judgment on collateral review does not toll one-year statute of limitations under 28 U.S.C. § 2244(d)).

Amendment issues presented here.[14]

CONCLUSION

For the foregoing reasons, Petitioner prays that this Court grant a writ of certiorari to the Alabama Court of Criminal Appeals.

Respectfully submitted,

BRYAN A. STEVENSON
Counsel of Record
CHARLOTTE R. MORRISON
AARYN M. URELL
Equal Justice Initiative
122 Commerce Street
Montgomery, AL 36104
bstevenson@eji.org
(334) 269-1803

Counsel for Petitioner

November 22, 2013

[14]The State suggests both that Mr. Hinton's ineffectiveness claim was raised in the trial court too late and that it was not raised in the trial court at all. No procedural default bars or even complicates this Court's review of the state court's merits determination notwithstanding these contradictory and unsupported points. The decision on which the State's first point depends, Charest v. State, 854 So. 2d 1102 (Ala. Crim. App. 2002) (requiring that claims raised in amended petition "relate back" to original petition in order to avoid time bar), was overruled by the Alabama Supreme Court prior to the state court decision in this case. Ex parte Jenkins, 972 So. 2d 159 (Ala. 2005) (relation-back doctrine does not apply to Rule 32 proceedings). As to the second point, the State concedes that Mr. Hinton properly presented his claim to the trial court prior to the evidentiary hearing and that Mr. Hinton's ineffectiveness claim was addressed on the merits by the state court. State's Br. in Opp'n 22-23.

RECEIVED
NOV 2 6 2013
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 13-6440

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY RAY HINTON, Petitioner,

v.

STATE OF ALABAMA, Respondent.

PROOF OF SERVICE

I, Bryan A. Stevenson, a member of the Bar of this Court, do declare that on this date, November 22, 2013, as required by Supreme Court Rule 29, I served the enclosed Reply Brief in Support of Petition for Writ of Certiorari on the Alabama Attorney General by depositing an envelope containing the above document with the United States Postal Service properly addressed to each of them and with first-class postage prepaid.

All parties required to be served have been served. The names and addresses of those served are as follows:

Andrew Brasher
Office of the Attorney General
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
abrasher@ago.state.al.us

Respectfully submitted,

BRYAN A. STEVENSON
Counsel of Record
CHARLOTTE K. MORRISON
AARYN M. URELL
Equal Justice Initiative
122 Commerce Street
Montgomery, Alabama 36104
bstevenson@eji.org
(334) 269-1803

Counsel for Petitioner

November 22, 2013

Equal Justice Initiative
122 Commerce Street
Montgomery, Alabama 36104
334.269.1803

November 22, 2013

Scott S. Harris
Clerk of the Court
Supreme Court of the United States
1 First Street, NE
Washington, DC 20543

RE: No. 13-6440, Anthony Ray Hinton v. State of Alabama

Dear Mr. Harris:

Please find enclosed for filing an original and 10 copies of Anthony Hinton's Reply Brief in Support of Petition for Writ of Certiorari. Also enclosed is an original of the Proof of Service.

Thank you for your assistance in this very important matter.

Sincerely,

Bryan A. Stevenson

Counsel for Anthony Ray Hinton

RECEIVED
NOV 25 2013
OFFICE OF THE CLERK
SUPREME COURT, U.S.

AMICUS CURIAE BRIEF

No. 13-6440

IN THE

Supreme Court of the United States

ANTHONY RAY HINTON,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Petition for a Writ of Certiorari to the Alabama Court of Criminal Appeals

BRIEF OF THE CONSTITUTION PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

VIRGINIA SLOAN
ELIZABETH FASSE
The Constitution Project
1200 18th Street, N.W.,
Washington, D.C. 20036
(202) 580-6938

JEFFREY T. GREEN*
ERIKA L. MYERS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
jgreen@sidley.com

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIVERSITY SUPREME COURT PRACTICUM
375 East Chicago Ave.
Chicago, IL 60611
(312) 503-8576

Counsel for Amicus Curiae

October 21, 2013 * Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	5
I. WHERE EXPERT TESTIMONY IS CRITICAL TO THE PROSECUTION'S CASE, DEFENSE COUNSEL'S FAILURE TO CHALLENGE SUCH TESTIMONY IN AN EFFECTIVE MANNER MAY CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL.	5
A. Flawed Forensic Testimony Has Led To Numerous Wrongful Convictions.	5
B. Defense Counsel's Failure To Challenge Critical Forensic Testimony In An Effective Manner Violated The Sixth Amendment.	15
II. THE COURT SHOULD GRANT THIS PETITION BECAUSE THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT WILL CONSTRAIN ANY FURTHER FEDERAL COURT REVIEW.	20
CONCLUSION	22

TABLE OF AUTHORITIES

Page(s)

CASES

Cavazos v. *Smith*, 132 S. Ct. 2 (2011) 21
Daubert v. *Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) 6
Ex parte Hinton, No. 1051390, 2008 WL 4603723 (Ala. Oct. 17, 2008) 14
Harrington v. *Richter*, 131 S. Ct. 770 (2011) 16, 21
Hinton v. *State*, No. CR-04-0940, 2006 WL 1125605 (Ala. Crim. App. Apr. 28, 2006), *rev'd and remanded by Ex parte Hinton*, No. 1051390, 2008 WL 4603723 (Ala. Oct. 17, 2008)..... 13, 14, 15, 16, 17, 18, 19
Hinton v. *State*, No. CR-04-0940, 2008 WL 5517591 (Ala. Crim. App. Aug. 26, 2011), *rev'd and remanded by Ex parte Hinton*, No. 1110129, 2012 WL 5458542 (Ala. Nov. 9. 2012)..... 2, 4, 19, 20
Lockyer v. *Andrade*, 538 U.S. 63 (2003) 21
Melendez-Diaz v. *Massachusetts*, 557 U.S. 305 (2009) 7
Rompilla v. *Beard*, 545 U.S. 374 (2005) 20
United States v. *Glynn*, 578 F. Supp. 2d 567 (S.D.N.Y. 2008) (Rakoff, J.) 12
United States v. *Green*, 405 F. Supp. 2d 104 (D. Mass 2005)..... 11, 12, 13
United States v. *Monteiro*, 407 F. Supp. 2d 351 (D. Mass. 2006)..... 12, 13, 18
Wiggins v. *Smith*, 539 U.S. 510 (2003)..... 17
Yarborough v. *Alvarado*, 541 U.S. 652 (2004) 21

TABLE OF AUTHORITIES—continued

Page(s)

STATUTES

28 U.S.C. § 2254(d)(1) 20
Ala. Code § 15-12-21(d) 17

OTHER AUTHORITIES

60 Minutes: Evidence of Injustice (CBS News Broadcast Sept. 12, 2008), *available at* http://www.cbsnews.com/8301-18560_162-3512453.html 9

Adina Schwartz, *A Systemic Challenge to the Reliability and Admissibility of Firearms and Toolmark Identification*, 6 Colum. Sci. & Tech. L. Rev. 2 (2004-05) 12, 13, 15

Allan Raitz et al., *Determining Damages: The Influence of Expert Testimony on Juror Decision Making*, 14 Law & Hum. Behav. 385 (1990) 6

Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1 (Mar. 2009) 10

Comm. on Identifying the Needs of the Forensic Scis. Cmty. et al., Nat'l Research Council, *Strengthening Forensic Science In The United States: A Path Forward* (2009) 5, 7, 8, 10, 11, 13, 15, 18

Comm. on Scientific Assessment of Bullet Lead Elemental Composition Comparison, Nat'l Research Council, *Forensic Analysis: Weighing Bullet Lead Evidence* 113 (2004) 9

TABLE OF AUTHORITIES—continued

Page(s)

Deborah Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts*, 87 Wash. U. L. Rev. 1 (2009) 9

Franklin Strier, *Making Jury Trials More Truthful*, 30 U.C. Davis L. Rev. 95, (1996) 7, 18

Giovanna Shay & Christopher Lasch, *Initiating a New Constitutional Dialogue: The Increased Importance Under AEDPA of Seeking Certiorari from Judgments of State Courts*, 50 Wm. & Mary L. Rev. 211 (Oct. 2008) 21

Janine Robben, *The 'CSI' Effect: Popular Culture and the Justice System*, 66-OCT Or. St. B. Bull. 9 (Oct. 2005) 5

Jessica D. Gabel, *Forensiphilia: Is Public Fascination with Forensic Science a Love Affair or Fatal Attraction?*, 36 New Eng. J. on Crim. & Civ. Confinement 233 (2010) 6

Keith A. Findley, *Innocents at Risk: Adversary Imbalance, Forensic Science, and the Search for Truth*, 38 Seton Hall L. Rev. 893 (2008) 6, 7

Mark Donohoe, *Evidence-Based Medicine and Shaken Baby Syndrome, Part I: Literature Review, 1966–1998*, 24 Am. J. Forensic Med. & Pathology 239, (2003) 9

Mark A. Godsey & Marie Alao, *She Blinded Me with Science: Wrongful Convictions and the "Reverse CSI-Effect,"* 17 Tex. Wesleyan L. Rev. 481 (2011) 6, 8

TABLE OF AUTHORITIES—continued

Page(s)

Nat'l Registry of Exonerations: A Joint Project of Michigan Law and Northwestern Law, http://www.law.umich.edu/special/exoneration/ Pages/browse.aspx (last visited Oct. 21, 2013) 9, 10

Nat'l Right to Counsel Comm., The Constitution Project, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* (Apr. 2009), *available at* http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf 2, 16

Peter J. Neufeld & Neville Colman, *When Science Takes the Witness Stand*, 262 Sci. Am. 46 (1990) 6, 15

Richard Grzybowski et al., *Firearm/Toolmark Identification: Passing the Reliability Test Under Federal and State Evidentiary Standards*, 35 AFTE J. 209 (2003) 11

INTEREST OF *AMICUS CURIAE*[1]

The Constitution Project is an independent, not-for-profit think tank that promotes and defends constitutional safeguards and seeks consensus solutions to difficult legal and constitutional issues. It respectfully submits this brief as *amicus curiae* in support of petitioner.

The Constitution Project advances its goals through constructive dialogue across ideological and partisan lines, and through scholarship, advocacy, and public education efforts. It often undertakes original research, publishes reports and statements, testifies before Congress, and holds regular briefings with legislative staff and other policymakers. Its work has been cited by numerous government agencies and by leading law and policy organizations. The Constitution Project also frequently appears as *amicus curiae* before this Court, the federal courts of appeals, and the highest state courts in support of the protection of citizens' constitutional rights.

The Constitution Project's National Right to Counsel Committee is a bipartisan committee of independent experts representing all segments of the American justice system. The Committee was established in 2004 to examine whether criminal defendants and juveniles charged with delinquency receive adequate legal representation. In 2009, the Commit-

---

[1] No counsel for any party authored this brief in whole or in part, and no person other than the *amicus curiae*, its members, or its counsel, made any monetary contribution to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amicus curiae* certify that counsel of record for both parties received timely notice of *amicus curiae's* intent to file this brief and have consented to its filing in letters on file with the Clerk's office.

tee issued a report, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, that included findings on the ineffective assistance of counsel in the criminal justice system. *Available at* http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf. The Committee's report concluded that courts' application of the standards "for judging effective assistance of counsel has been unsuccessful in protecting the innocent, let alone ensuring that counsel has performed competently." *Id.* at 43.

The Constitution Project supports review in this case because the Alabama Court of Criminal Appeals has departed from this Court's controlling precedents and rewritten the test set forth in *Strickland* v. *Washington*, 466 U.S. 668 (1984). The only evidence of guilt in this capital case was the testimony of two state experts that a gun linked to the defendant matched bullets found at the scenes of two murders. That testimony has now been definitively debunked, but that did not happen at Mr. Hinton's trial because of defense counsel's constitutionally deficient performance. Defense counsel recognized that challenging the State's expert testimony was critical. Yet defense counsel retained an incompetent expert who he knew would be ineffective at trial, under the mistaken belief that he could not obtain funding to hire a more qualified expert.

Rather than applying *Strickland*'s two-part test and evaluating whether these actions constituted deficient performance that prejudiced the defendant, the Alabama Court of Criminal Appeals held that Mr. Hinton's ineffective assistance claim was "meritless" because the expert's testimony met the minimal standards of admissibility under Alabama evidentiary rules, which require merely that the "expert"

have more knowledge than "the average man in the street." *Hinton* v. *State*, No. CR-04-0940, 2008 WL 5517591, at *6, *8 (Ala. Crim. App. Aug. 26, 2011) (quoting *Charles* v. *State*, 350 So. 2d 730, 733 (Ala. Crim, App. 1977)), *rev'd and remanded by Ex parte Hinton*, No. 1110129, 2012 WL 5458542 (Ala. Nov. 9, 2012).

The lower court's decision is part of a broader trend of flawed forensic expert testimony and ineffective defense counsel failing to properly challenge such testimony. Given the risk that faulty forensic evidence can lead to wrongful convictions, the question of the duty of defense counsel to engage competent forensic experts when the sole evidence against the defendant is based upon the testimony of state forensic experts is a critically important issue of federal law that this Court should review.

SUMMARY OF THE ARGUMENT

The testimony of state expert forensic witnesses has a powerful impact on jurors. Yet, many forensic disciplines, including firearms and toolmark analysis, lack rigorous scientific standards, and cannot reliably link a piece of evidence to a particular defendant with a high degree of certainty. Faulty expert testimony that overstates, or even completely misstates, the strength of such forensic evidence has resulted in the convictions of hundreds of innocent people. The danger that flawed expert testimony will lead to wrongful convictions is especially grave where—as here—such forensic testimony is the *only* evidence against the defendant in a capital murder trial.

When expert forensic testimony is critical to the prosecution's case, defense counsel's failure to challenge such testimony in an effective manner violates the Sixth Amendment's guarantee of effective assis-

tance of counsel. In this case, defense counsel recognized prior to trial that the expert he had retained to challenge the State's critical forensic evidence was not competent. He failed to retain a more qualified expert not as a result of a tactical decision as to the most promising trial strategy, but because he mistakenly believed that he could not obtain the necessary funds. The Alabama Court of Criminal Appeals, rather than evaluating whether defense counsel's actions constituted deficient performance and prejudiced the defendant under *Strickland*, wrongly held that Mr. Hinton's ineffective assistance claim was "meritless" because the expert's testimony met the minimal standards for admissibility under Alabama evidentiary rules, which require merely that the "expert" have more knowledge than "the average man in the street." *Hinton*, 2008 WL 5517591, at *6, *8. Under a proper *Strickland* analysis, counsel's failure to retain a competent firearms and toolmark expert constituted deficient performance that prejudiced Mr. Hinton; indeed, the evidence strongly suggests that it led to a miscarriage of justice, and caused an innocent man to be sentenced to death.

The Court should grant the petition for certiorari and review this matter now because, if the petition is denied, any further federal court review of this case will be constrained by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). This Court has repeatedly stressed that AEDPA imposes stringent limits on federal habeas corpus proceedings. Granting this certiorari petition would therefore allow the Court to address the critical Sixth Amendment issue presented here in a superior posture.

ARGUMENT

I. WHERE EXPERT TESTIMONY IS CRITICAL TO THE PROSECUTION'S CASE, DEFENSE COUNSEL'S FAILURE TO CHALLENGE SUCH TESTIMONY IN AN EFFECTIVE MANNER MAY CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL.

A. Flawed Forensic Testimony Has Led To Numerous Wrongful Convictions.

Criminal prosecutions increasingly depend on forensic expert testimony. Indeed, "[f]orensic science experts and evidence are routinely used in the service of the criminal justice system." Comm. on Identifying the Needs of the Forensic Scis. Cmty. et al., Nat'l Research Council, *Strengthening Forensic Science In The United States: A Path Forward*, 86 (2009). For instance:

> DNA testing may be used to determine whether sperm found on a rape victim came from an accused party; a latent fingerprint found on a gun may be used to determine whether a defendant handled the weapon; drug analysis may be used to determine whether pills found in a person's possession were illicit; and an autopsy may be used to determine the cause of death of a murder victim.

Id.; see also Janine Robben, *The 'CSI' Effect: Popular Culture and the Justice System*, 66-OCT Or. St. B. Bull. 9, 10 (Oct. 2005).

In many instances, this increasing reliance on expert forensic testimony has improved the reliability of prosecutions. See Nat'l Research Council, *Strengthening Forensic Science, supra*, at 4 ("[T]he forensic science disciplines have produced valuable evidence

that has contributed to the successful prosecution and conviction of criminals as well as to the exoneration of innocent people."). Such testimony, however, also presents serious pitfalls. Jurors typically lack the capacity to evaluate the accuracy of scientific assertions independently, and accordingly tend to place great weight on the testimony of witnesses presented as scientific experts. Therefore, as this Court has recognized, "[e]xpert evidence can be both powerful and quite misleading . . . ." *Daubert* v. *Merrell Dow Pharm., Inc.*, 509 U.S. 579, 595 (1993). "[T]he esoteric nature of an expert's opinions, together with the jargon and the expert's scholarly credentials, may cast an aura of infallibility over his or her testimony." Peter J. Neufeld & Neville Colman, *When Science Takes the Witness Stand*, 262 Sci. Am. 46, 48 (May 1990); see Jessica D. Gabel, *Forensiphilia: Is Public Fascination with Forensic Science a Love Affair or Fatal Attraction?*, 36 New Eng. J. on Crim. & Civ. Confinement 233 (2010).

Further, "forensic sciences are precisely the type of scientific evidence that juries are likely to consider objective and infallible." Keith A. Findley, *Innocents At Risk: Adversary Imbalance, Forensic Science, and the Search for Truth*, 38 Seton Hall L. Rev. 893, 943 (2008). When witnesses presented as scientific experts testify that "fingerprints, or bite marks, or hairs, or other such evidence from the crime scene can be matched in the laboratory to the defendant, even—as such experts sometimes claim—to the exclusion of all other persons in the world, that testimony is likely to be accepted as conclusive." *Id.*; see Mark A. Godsey & Marie Alao, *She Blinded Me with Science: Wrongful Convictions and the "Reverse CSI-Effect,"* 17 Tex. Wesleyan L. Rev. 481, 483-84 (2011); see generally, Allan Raitz et al., *Determining Damag-*

es: The Influence of Expert Testimony on Juror Decision Making, 14 Law & Hum. Behav. 385 (1990).

And because the jurors themselves lack scientific expertise, when parties present competing experts, juries' "scientific decisions . . . tend to be made based on assessments of the personality, credentials, and perceived credibility of the experts, more than on the validity of scientific research . . . ." Findley, *Innocents At Risk*, *supra*, 38 Seton Hall L. Rev. at 949. Therefore, "[a]n advantage lies with the party whose expert has the most persuasive forensic skills rather than the most authoritative and meritorious testimony." Franklin Strier, *Making Jury Trials More Truthful*, 30 U.C. Davis L. Rev. 95, 133 (1996).

The tendency of juries to accord great weight to the testimony of highly credentialed forensic experts becomes problematic when that testimony is flawed. While much forensic expert testimony is no doubt valid, "[s]erious deficiencies have been found in the forensic evidence used in criminal trials." *Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305, 319 (2009). Indeed, a recent study conducted at the request of Congress by the National Research Council of the National Academy of Sciences concluded that there is a significant danger that juries will give "undue weight to evidence and testimony derived from imperfect testing and analysis." Nat'l Research Council, *Strengthening Forensic Science*, *supra*, at 4. Such circumstances, the study found, can allow "true offenders [to] continue to commit crimes while innocent persons inappropriately serve time." *Id.* at 5.

The study further found that the reliability of expert testimony varies widely across different fields of forensics. *Id.* at 6. DNA analysis, for instance, has a strong and rigorously verified scientific basis, and "is now universally recognized as the standard against

which many other forensic individualization techniques are judged." *Id.* at 130. "[A]bsent fraud or an error in labeling or handling, the probabilities of a false positive [in DNA analysis] are quantifiable and often miniscule." *Id.* Other forensic techniques, however, "are based on observation, experience, and reasoning without an underlying scientific theory, experiments designed to test the uncertainties and reliability of the method, or sufficient data that are collected and analyzed scientifically." *Id.* at 128. These techniques are far less reliable than DNA analysis, and far more likely to lead to wrongful convictions. "Indeed, DNA testing has been used to exonerate persons who were convicted as a result of the misapplication of other forensic science evidence." *Id.* at 100.

Some fields of forensics have been found to be so flawed as to call into question their legitimacy. For instance, experts testified in many criminal trials that bite marks on a particular victim could be matched to the defendant's teeth, but the National Research Council found "no evidence of an existing scientific basis for identifying an individual to the exclusion of all others" through bite mark analysis. *Id.* at 176. "[I]n case after case where inmates convicted on bite mark evidence were able to obtain DNA testing of the saliva found on the skin or clothing where the bite mark occurred, the DNA testing proved that they had not in fact been the biter/perpetrator." Godsey & Alao, *She Blinded Me with Science*, *supra*, 17 Tex. Wesleyan L. Rev at 485.

Similarly, FBI crime lab analysts testified in criminal trials for 40 years that "lead in bullets had unique chemical signatures" and that "it was possible to match bullets, not only to a single batch of ammunition coming out of a factory, but to a single box of bul-

lets." *60 Minutes: Evidence of Injustice* (CBS News Broadcast Sept. 12, 2008), *available at* http://www.cbsnews.com/8301-18560_162-3512453.html. Yet when the National Research Council subjected these claims to scientific testing, the tests revealed that "the available data do not support any statement that a crime bullet came from, or is likely to have come from, a particular box of ammunition, and references to 'boxes' of ammunition in any form are seriously misleading . . . ." Comm. on Scientific Assessment of Bullet Lead Elemental Composition Comparison, Nat'l Research Council, *Forensic Analysis: Weighing Bullet Lead Evidence* 113 (2004).

Expert testimony regarding "Shaken Baby Syndrome" also has been discredited recently. For years, experts testified in criminal trials that certain types of brain injuries to infants could only have been caused by a person violently shaking the infant. Deborah Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts*, 87 Wash. U. L. Rev. 1 (2009). But "[t]here is now general agreement among the medical community that the previous incarnation of [shaken baby syndrome] is invalid," *id.* at 6, and that there is "inadequate scientific evidence to come to a firm conclusion on most aspects of causation, diagnosis, treatment, or any other matters pertaining to [shaken baby syndrome]," Mark Donohoe, *Evidence-Based Medicine and Shaken Baby Syndrome, Part I: Literature Review, 1966–1998*, 24 Am. J. Forensic Med. & Pathology 239, 241 (2003). Indeed, it is now recognized that injuries which experts testified could *only* have been caused by violent shaking can in fact be caused by infections, strokes, blood clotting problems, accidental falls, and other conditions. See *Nat'l Registry of Exonerations:*

A Joint Project of Michigan Law and Northwestern Law, http://www.law.umich.edu/special/exoneration/Pages/browse.aspx (last visited Oct. 21, 2013) (listing eleven exonerations of defendants wrongfully convicted because of expert testimony regarding Shaken Baby Syndrome).

Even where the forensic techniques themselves are generally reliable, expert testimony based on flawed analysis or overstatement of the evidence has led to hundreds of wrongful convictions. Many fields of forensics—including analysis of fingerprints, hair, shoe and tire marks, firearm and toolmarks, DNA, and blood—are geared towards "individualization," or, in other words, determining whether evidence obtained from a defendant can be "match[ed]" to evidence found at the crime scene. Nat'l Research Council, *Strengthening Forensic Science, supra*, at 7. But "[w]ith the exception of nuclear DNA analysis, . . . no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source." *Id.* In hundreds of wrongful convictions, forensic experts testified that evidence could be conclusively matched to a defendant, even though there was no empirical support for such a statement, or the experts gave inaccurate statistics that greatly overstated the probability that the evidence could be matched to the defendant. Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1 (Mar. 2009); see *Nat'l Registry of Exonerations, supra* (listing 272 exonerations of defendants wrongfully convicted wholly or partially on the basis of false or misleading forensic evidence).

Firearms and toolmark analysis—the type of forensic testimony at issue in this case—is not free from

these problems. "The task of the firearms and toolmark examiner is to identify the individual characteristics of microscopic toolmarks . . . and then to assess the extent of agreement . . . to permit the identification of an individual tool or firearm." Nat'l Research Council, *Strengthening Forensic Science, supra*, at 153. The technique essentially consists of examining under a microscope bullets fired from a particular gun and bullets found at a crime scene, and coming to a judgment as to whether the bullets match. *Id.* at 152.

The technique is not inherently unreliable, and can reliably *exclude* the possibility that a particular gun fired a particular bullet. *Id.* at 154. Expert testimony that purports to determine definitively that a particular gun *must have* fired a particular bullet, however, is not currently supported by science. Indeed, the National Research Council found that there are no existing standards for "the number of correlations needed to achieve a given degree of confidence" that two bullets were fired from same gun. *Id.* at 155; see *United States* v. *Green*, 405 F. Supp. 2d 104, 114 (D. Mass 2005) (finding that "there are no national standards to be applied to evaluate how many marks must match" for a toolmark expert to match a bullet to a gun). In other words, there is no empirical basis for determining the probability that a particular gun fired a particular bullet. Rather, an expert's determination whether a bullet matches a gun "remains a subjective decision based on unarticulated standards and no statistical foundation for estimation of error rates." Nat'l Research Council, *Strengthening Forensic Science, supra*, at 153-54; see Richard Grzybowski et al., *Firearm/Toolmark Identification: Passing the Reliability Test Under Federal and State Evidentiary Standards*, 35 AFTE J. 209, 213 (2003) (finding that

it "is not possible to calculate an absolute error rate for routine casework" in firearms and toolmark analysis).

As one court noted, there is an "almost complete lack of factual and statistical data pertaining to the problem of establishing identity in the field of firearm identification." *United States* v. *Monteiro*, 407 F. Supp. 2d 351, 367 (D. Mass. 2006) (quoting Alfred A. Biasotti, *A Statistical Study of the Individual Characteristics of Fired Bullets*, 4 J. Forensic Sci. 34 (1959)). Testimony "claiming to be able to single out a particular firearm or other tool as the source of an evidence toolmark, to the exclusion of all other tools in the world," is therefore not backed by empirical data and may "fundamentally mislead judges and juries." Adina Schwartz, *A Systemic Challenge to the Reliability and Admissibility of Firearms and Toolmark Identification*, 6 Colum. Sci. & Tech. L. Rev. 2, 32 (2004-05); see *Green*, 405 F. Supp. 2d at 109 (excluding an expert's opinion that a bullet could be definitively matched to a particular gun under *Daubert* because "[t]hat conclusion—that there is a definitive match—stretches well beyond [the expert's] data and methodology."); *United States* v. *Glynn*, 578 F. Supp. 2d 567, 570 (S.D.N.Y. 2008) (Rakoff, J.) ("[W]hatever else ballistics identification analysis could be called, it could not fairly be called 'science.'").

There is also a significant risk of false positives, because many of the microscopic markings on bullets may be common to a particular model of gun, rather than unique to one individual weapon. Schwartz, *A Systemic Challenge*, *supra*, 6 Colum. Sci. & Tech. L. Rev. at 14. Controlled studies have found that "[t]he similarities between known non-matching toolmarks were sometimes so great that even under a comparison microscope, it was difficult to tell the toolmarks

apart and not erroneously attribute them to the same gun." *Id.* at 15. As there are no widely accepted rules for distinguishing which marks are unique to a single gun, "examiners can only rely on their personal familiarity" with the manufacturing processes and toolmarks left by similar weapons. *Id.* at 21; see *Green*, 405 F. Supp. 2d at 107 ("The examiner has to exercise his judgment as to which marks are unique to the weapon in question, and which are not."). And because the technique "involve[s] subjective qualitative judgments by examiners," "the accuracy of examiners' assessments is highly dependent on their skill and training." Nat'l Research Council, *Strengthening Forensic Science, supra*, at 153; see *Monteiro*, 407 F. Supp. 2d at 366 (finding that the process "of identifying a match between a particular cartridge case and gun . . . is admittedly 'subjective' and based on experience and training of the individual examiner.").

In this case, the State presented testimony from two forensic experts, both of whom were professional firearms and toolmark examiners with the Alabama Department of Forensic Sciences, and both of whom had testified for the state in hundreds of cases. *Hinton* v. *State*, No. CR-04-0940, 2006 WL 1125605, at *9-10 (Ala. Crim. App. Apr. 28, 2006), *rev'd and remanded by Ex parte Hinton*, No. 1051390, 2008 WL 4603723 (Ala. Oct. 17, 2008). Both of the State's experts testified without caveat that the bullets found at all three crime scenes had been fired from the same gun, and that the gun was "the revolver that was recovered from [Mr. Hinton's] mother." *Id.* at *10.

This expert testimony was not only critical to the murder prosecution—it was the prosecution's entire case. "[T]he only evidence linking Hinton to the two murders were forensic comparisons of the bullets re-

covered from those crime scenes to the Hinton revolver." *Ex parte Hinton*, 2008 WL 4603723, at *2. Indeed, other evidence—including a strong alibi, that Mr. Hinton was at work in a secured warehouse facility during one of the crimes—supported Mr. Hinton's claim of innocence. *Hinton*, 2006 WL 1125605, at *19. The prosecution conceded at a suppression hearing that its case rested on the forensic testimony alone, stating "if the evidence of the firearms experts of the State of Alabama is not sufficient then, of course, a judgment of acquittal would lie . . . ." R.836[2]; see Pet. at 8-9, 14. This lack of any other evidence led the dissent below to remark: "In all my tenure on the bench, I have never seen the State successfully prosecute a capital-murder case when the only evidence of guilt consisted of testimony by a firearms and toolmark expert. This was an amazing prosecutorial feat . . . ." *Hinton*, 2006 WL 1125605, at *69 (Cobb, J., dissenting).

This "amazing prosecutorial feat" was made possible by defense counsel's failure to retain a competent forensic expert to challenge the State's evidence. Instead, defense counsel presented testimony from a partially blind civil engineer, Andrew Payne, who had little training or experience with toolmark analysis. R.1641-42; R.1667. Mr. Payne did not know how to use a comparison microscope to determine whether bullets from the crime scenes matched bullets from Mr. Hinton's mother's gun; indeed, for most of his examination, he could not even find the bullets under the microscope. R.1653-54.

---

[2] References are to the appellate record below. "R." refers to the trial transcript, and "PR." refers to the transcript of the postconviction hearing.

Unsurprisingly, the prosecution conducted a devastating cross-examination of Mr. Payne, and thoroughly discredited him in front of the jury, successfully characterizing him as a "charlatan" who was "not a firearms and tool marks expert . . . . [n]o expert at all." R.1732-33, 1727; see R.1728 (prosecutor's statement that Mr. Payne "knows very, very little about what he came up here to testify about, very little."). As the prosecution told the jury, there was simply "no comparison" between Mr. Payne's qualifications and experience and those of the State's two experts.

With Mr. Payne thoroughly discredited, Mr. Hinton was unable to challenge the State's expert testimony, leaving its "aura of infallibility" undisturbed. Neufeld & Colman, *When Science Takes the Witness Stand*, *supra*, 262 Sci. Am. at 48. The jury was thus led to believe that it had been conclusively and scientifically determined that the bullets from each murder scene could only have been fired from Mr. Hinton's gun, even though more recent studies, including by the National Research Council, have concluded that there is no established scientific basis to determine with a high degree of certainty that a particular bullet was fired from a particular gun. Nat'l Research Council, *Strengthening Forensic Science*, *supra*, at 153-55; Schwartz, *A Systemic Challenge*, *supra*, 6 Colum. Sci. & Tech. L. Rev. at 32. Given the lack of any other evidence of Mr. Hinton's guilt—and the strong evidence of his innocence—"[c]onfidence in the outcome of Hinton's trial has been seriously undermined . . . ." *Hinton*, 2006 WL 1125605, at *69 (Cobb, J., dissenting).

B. Defense Counsel's Failure To Challenge Critical Forensic Testimony In An Effective Manner Violated The Sixth Amendment.

"The causes of wrongful conviction, . . . [including] faulty scientific evidence . . . are all matters that competent defense lawyers can address," but "defendants who are innocent . . . stand virtually no chance of avoiding conviction absent dedicated representation . . . ." The Constitution Project, *Justice Denied, supra*, at 47. While in many cases defense counsel will have a wide range of reasonable strategies, "[c]riminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both." *Harrington* v. *Richter*, 131 S. Ct. 770, 788-89 (2011). Therefore, "[i]t can be assumed that in some cases counsel would be deemed ineffective for failing to consult or rely on experts . . . ." *Id.*

This is just such a case. The State repeatedly conceded before and during trial that the only evidence tying Mr. Hinton to the two murders was the testimony of its forensic experts. See Pet. 19-22. Therefore, "it was essential . . . that trial counsel retain a qualified firearms and toolmarks expert to testify with respect to what the parties agree was the crucial issue at trial—whether the bullets found at the crime scenes could be connected to the gun found at the residence of Hinton's mother." *Hinton*, 2006 WL 1125605, at *70 (Shaw, J., dissenting).

Yet instead of hiring a competent firearms and toolmark expert, defense counsel hired Mr. Payne. Defense counsel's choice of Mr. Payne was not based on any strategic judgment that Payne would be effective with the jury, but rather was based on counsel's

failure to investigate Alabama law. See *Wiggins* v. *Smith*, 539 U.S. 510, 522 (2003) (explaining that "counsel's failure . . . could not be justified as a tactical decision . . . because counsel had not 'fulfill[ed] [his] obligation to conduct a thorough investigation . . . .'" (quoting *Williams* v. *Taylor*, 529 U.S. 362, 396 (2000))). At a pretrial hearing, defense counsel told the trial judge that he believed Mr. Payne might not be qualified to testify, and that another attorney who knew Mr. Payne did not recommend him. R.62-71. Defense counsel likewise testified at the postconviction hearing that he did not believe that Mr. Payne had the expertise needed and that Mr. Payne's trial testimony had not been effective. PR.188-89; see *Hinton*, 2006 WL 1125605, at *59-60 (Cobb, J., dissenting).

Defense counsel hired Mr. Payne because, out of ignorance of State law, he mistakenly believed that the State would not reimburse more than $500 per case in expert fees for indigent criminal defendants. Therefore, as defense counsel told the court before trial, he believed he was "stuck" with Mr. Payne as "the only guy I could possibly produce," as he had not been able to find any other experts willing to testify for so little money. R.71. However, the law governing state funds for experts had been amended; the version in effect at the time of Mr. Hinton's trial provided that the state would reimburse any expenses reasonably incurred in the defense of an indigent criminal defendant. Ala. Code § 15-12-21(d). "Counsel failed to conduct a reasonable investigation—or any investigation—into the current law; he failed to discover that the former statutory limitation had been eliminated 18 months before the pretrial hearings were held in this case, and more than 2 years be-

fore the trial." *Hinton*, 2006 WL 1125605, at *61 (Cobb, J., dissenting).

The predictable result of defense counsel's decision to present Mr. Payne as an expert witness was that the State devastated Mr. Payne's credibility on cross-examination, and successfully characterized Mr. Payne to the jury as a "charlatan," R.1727, 1732-33, who "didn't have a clue about what he was doing," R.1728. The prosecutor even aptly stated during closing argument that presenting Mr. Payne as an expert in firearms and toolmark analysis was "the height of irresponsibility," R.1733, and that it was "startling and disturbing, alarming and almost sickening to see someone come up here and give an opinion like that," R.1728. The prosecution's attack on Mr. Payne's qualifications and skills was especially damaging because the value of toolmark testimony, and jury evaluation of expert testimony in general, is "highly dependent on the[] skill and training" of the expert. Nat'l Research Council, *Strengthening Forensic Science, supra*, at 153; *Monteiro*, 407 F. Supp. 2d at 366; Strier, *Making Jury Trials More Truthful*, *supra*, 30 U.C. Davis L. Rev. at 133. Thus, "[t]he testimony on the *only* physical evidence that connected Hinton to any of the crimes was useless to him because it was delivered by a witness who [was] not qualified or competent to render the opinions." *Hinton*, 2006 WL 1125605, at *64 (Cobb, J., dissenting).

At Mr. Hinton's postconviction hearing, by contrast, the defense introduced testimony from three highly qualified experts. All three were professional firearms and toolmark examiners with decades of experience in the field; one was the former Chief of the Firearms and Toolmark Unit at FBI Headquarters, and the former President of the Association of Firearms and Toolmark Examiners. PR.61-65, 113-14,

135; see *Hinton*, 2006 WL 1125605, at *64 (Cobb, J., dissenting). All three testified that they could not match the bullets from the three crime scenes to a single gun, and could not match any of the crime scene bullets to Mr. Hinton's mother's gun. PR.73-74, 77, 116-19, 141-44. Further, two of the experts testified that Mr. Hinton's mother's gun was mechanically *incapable* of firing the bullets from one of the crime scenes. PR.86, 120-23. The State presented no new evidence at the postconviction hearing to rebut the testimony of these three experts. PR.106-07. "If such testimony had been presented at Hinton's trial by qualified, competent experts in the field of firearms and toolmark examinations, there is a reasonable probability that the result of the proceeding would have been different," because the State could not have discredited the testimony by attacking the skills and qualifications of the experts. *Hinton*, 2006 WL 1125605, at *66 (Cobb, J., dissenting).

The Alabama Court of Criminal Appeals rejected this argument. It looked to the "criterion for admission of expert testimony" under Alabama law at the time of Mr. Hinton's trial, *Hinton*, 2008 WL 5517591, at *6 (quoting *Meade* v. *State*, 390 So. 2d 685, 693 (Ala. Crim. App. 1980)), and held that Mr. Payne's testimony was admissible because his knowledge of firearms and toolmark analysis was "to some degree better than that found in the average juror or witness," and Mr. Payne could "enlighten a jury more than the average man in the street." *Hinton*, 2008 WL 5517591, at *6 (quoting *Charles*, 350 So. 2d at 733). Therefore, the state court concluded, defense counsel's presentation of Mr. Payne's testimony *could not* constitute ineffective assistance: "Because Payne was a qualified expert in firearms identification, even if his qualifications did not match those of the State's

experts, Hinton's claim that his trial counsel was ineffective for not procuring a qualified firearms-identification expert is meritless . . . ." *Id.* at *8.

The Alabama Court of Criminal Appeals' decision directly conflicts with *Strickland*. The question under *Strickland* is not whether Mr. Payne's testimony was admissible, but whether, under the circumstances, defense counsel's decision to present that testimony was deficient performance that prejudiced Mr. Hinton. *Rompilla* v. *Beard*, 545 U.S. 374, 380-81 (2005). This Court should grant certiorari to address that conflict on a critically important issue of federal law, in a case where there is a serious danger that the state court's erroneous legal standard could result in the execution of an innocent man.

II. THE COURT SHOULD GRANT THIS PETITION BECAUSE THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT WILL CONSTRAIN ANY FURTHER FEDERAL COURT REVIEW.

This Court should grant the petition for the additional reason that, if the petition is denied, any further federal court review of this case would be constrained by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Section 2254(d)(1) of AEDPA provides that federal courts cannot grant relief on habeas review of state court convictions unless the state court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

AEDPA significantly limits the ability of federal courts to review *Strickland* claims. "The more general the rule, the more leeway courts have in reach-

ing outcomes in case-by-case determinations" under AEDPA, *Yarborough* v. *Alvarado*, 541 U.S. 652, 664 (2004), and "[t]he *Strickland* standard is a general one, so the range of reasonable applications is substantial," *Richter*, 131 S. Ct. at 788. "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*[]." *Id.* Therefore, on federal habeas review, "[a] state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself." *Id.* at 785.

While AEDPA "stops short of imposing a complete bar on federal court relitigation," it tightly limits federal courts' review in habeas cases. *Id.* at 786. Whether the state court's decision was unreasonable is "the only question that matters under § 2254(d)(1)." *Lockyer* v. *Andrade*, 538 U.S. 63, 71 (2003); see also *Cavazos* v. *Smith*, 132 S. Ct. 2, 7 (2011) (in a Shaken Baby Syndrome case where AEDPA applied, "[d]oubts about whether Smith is in fact guilty are understandable," but cannot support federal habeas relief); Giovanna Shay & Christopher Lasch, *Initiating a New Constitutional Dialogue: The Increased Importance Under AEDPA of Seeking Certiorari from Judgments of State Courts*, 50 Wm. & Mary L. Rev. 211 (Oct. 2008). Because AEDPA does not apply in the current posture of this case, this petition for certiorari presents a superior vehicle for this Court to address the critical Sixth Amendment issues presented here, and to consider the serious miscarriage of justice that occurred in this death penalty action.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari to the Alabama Court of Criminal Appeals.

Respectfully submitted,

VIRGINIA SLOAN
ELIZABETH FASSE
The Constitution Project
1200 18th Street, N.W.,
Washington, D.C. 20036
(202) 580-6938

SARAH O'ROURKE SCHRUP
NORTHWESTERN
UNIVERSITY SUPREME
COURT PRACTICUM
375 East Chicago Ave.
Chicago, IL 60611
(312) 503-8576

JEFFREY T. GREEN*
ERIKA L. MYERS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
jgreen@sidley.com

Counsel for Amicus Curiae

* Counsel of Record

October 21, 2013